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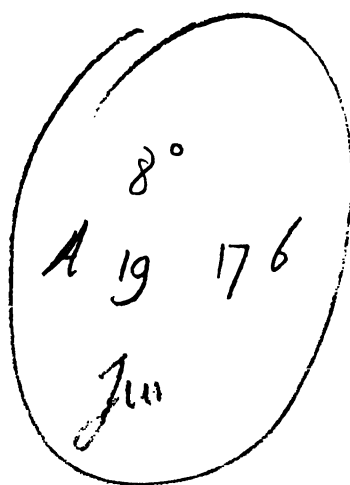
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A
T R E A T I S E
ON
T H E L A W
OF
P R I N C I P A L A N D S U R E T Y .

BY
EDWARD DIX PITMAN, ESQ., A.M.
BARRISTER AT LAW.

"Hoc unum deest avaritiæ, ut beneficia sine sponsore non demus."
SEN. de benef. lib. 3. cap. XV.

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P R E F A C E.



THE principal parts of the following pages consist of notes collected by the author in the course of his reading, and for his own use, without any view to publication. His attention having been lately more particularly directed to the subject of Principal and Surety, he thought that these notes, with some additions and alterations, might be made useful as a Summary of the Law on which his book professes to treat. In the progress of the work, the character which the book was originally intended to assume, has been lost sight of; and if it cannot, with propriety, be called a Summary, the author fears it may, with still less propriety, be called a Treatise. The utility, however, of the work (if indeed it should be of any use) will not be affected by its title; and in the hope that it

may be of service to some portion of the Profession,
the author has been induced to publish it.

Some cases which have been published during
the progress of the work through the press, will
be found in the *Addenda*.

5, New Square, Lincoln's Inn,
18th May, 1840.

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Tothill	Toth.
Turner & Russell	T. & Russ.
Tyrwhitt	Tyrw.
Ventris	Ventr.
Vernon	Vern.
Vesey (senior)	Ves.
——— (junior)	Ves. Junr.
——— & Beames	Ves. & B.
Younge	You.
——— & Collier	You. & Coll.
——— & Jervis	You. & J.
Wightwick	Wightw.
Willes	Willes.
Wilson (Geo.)	Wils.
——— (Jno.)	Wills. C. C.

A D D E N D A.

Construction of guarantees with reference to the subject-matter in respect of which the surety makes himself liable, (p. 42.)

A BOND, after reciting that the principal obligor had opened an account with the obligees as his bankers, and that the obligees had agreed to advance to the principal obligor any sum or sums of money not exceeding at any one or more time or times, the sum of 200*l.* in the whole, was conditioned to be void, if the principal or his surety should pay to the obligees and all and every other person and persons who should become partner or partners with them in the said banking business, all such sum and sums of money not exceeding 200*l.*, as the said obligees, &c. should advance or pay to the principal obligor, was held a continuing security. (*Batson v. Spearman*, 9 Ad. & Ell. 298.)

Construction of guarantees with reference to the persons to whom they are given, (p. 45.)

Where the condition of a bond, after reciting that the obligees had appointed A. B. and C. their agents for the sale of books printed by the obligees, and that the defendant had offered to enter into a bond with the agents as a surety for them, was, that if the said A. B. and C., and the survivors and survivor of them, and such other person and persons as should or might at any time or times thereafter in partnership with them or any or either of them, *act as agent or agents* of the said obligees for the sale of books as aforesaid, did and should account to the obligees for all books delivered or sent to *them or any or either of them* for sale as aforesaid, and should pay all monies which should become payable to the obligees in respect of such sale, the obligation was to be void. It was held, that

by the *retirement* of C. from the partnership of A., B. and C., the defendant as their surety was discharged from all further liability on the bond. (*University of Cambridge v. Baldwin*, 5 Mees. & W. 580.)

Where the consideration sufficiently appears upon the written agreement, (p. 64.)

“ *Messrs. Kennaway and Co.*

“ Gentlemen—I hereby guarantee to you, Messrs. Kennaway and Co., the sum of 250*l.*, in case Mr. Paddon, of &c., should default in his capacity of agent and traveller to you.” It was held, that the consideration sufficiently appeared. (*Kennaway v. Treleavan*, 5 Mees. & W. 498.)

Where no consideration, or no sufficient consideration, appears upon the written agreement, (p. 69.) (See *Bentham v. Cooper*, 5 Mees. & W. 621.)

Where the consideration which appears upon the written agreement is in part sufficient and in part insufficient, (p. 72.)

“ *Messrs. Raikes*,

“ Oct. 19, 1832.

“ Gentlemen—I hereby undertake to secure to you the payment of any sums of money you have advanced, or may hereafter advance, to Messrs. Henry Davenport and Co. on their account with you, commencing the 1st Nov. 1831, not exceeding 2,000*l.*” (*Raikes v. Todd*, 8 Ad. & Ell. 846.)

Of the rights and remedies of the creditor with relation to the surety, (p. 85.)

If there is any condition precedent to any liability to be incurred by the surety, that condition must be strictly performed : thus, where a surety joined his principal in a bond, conditioned for the payment to the obligees of all sums of money advanced by them to the principal *within three calendar months after receiving notice to pay such sums*, It was held, that in assigning a breach of the condition, it was not enough to aver that the surety “ had and received notice,” that certain sums were

due from the principal, without averring a notice or request *to pay*. (*Batson v. Spearman*, 9 Ad. & Ell. 298.)

Of the rights and remedies of the surety, with relation to the creditors, (p. 122.)

The principle of *Ex parte Rushforth* (10 Ves. 409), acknowledged at law. (*Raikes v. Todd*, 8 Ad. & Ell. 846.)

Where the creditor compounds with, or releases, the principal, (p. 189.)

A creditor who has compounded with and released the principal, with the *parole* consent of the surety, and under a promise that the surety will make good the difference of the debt, may have relief in equity, though the surety is discharged at law. (*Brooks v. Stuart*, 1 Beav. 512.)

Of actions by the creditor, (p. 227.)

Where the averments contained in the declaration are not proved. (See *Raikes v. Todd*, 8 Ad. & Ell. 846.)

Of the necessary parties to a suit in Equity, (p. 234.)

The principal is a necessary party to a bill by the creditor, for relief against the surety, where the bill states that the plaintiff had with the consent of the surety compounded with and released the principal, and consequently where the creditor could have no relief against the principal—unless it clearly appear that the surety likewise could have no relief against the principal. (*Brooks v. Stuart*, 1 Beav. 512.)

ERRATA.

- Page 28. in note, l. 8, from the bottom, *for* "Hulton," *read* "Hutton."
 46. l. 9. *for* "nomination," *read* "nominatim."
 105. l. 22. *for* "constitutes a debt proveable under the surety's bankruptcy," *read* "is considered in a court of law as a legal debt."
 138. l. 9. *dele* "draws."
 187. l. 3. *for* "unum quodque," *read* "unumquodque."

A TREATISE

ON THE

Law of Principal and Surety.

PART I.

OF THE INSTRUMENT OF SURETYSHIP.

CHAPTER I.

OF THE NATURE OF AN INSTRUMENT BY WHICH SURETYSHIP MAY BE CREATED.

A CONTRACT of suretyship ⁽¹⁾, is a contract, whereby one person engages to be answerable for

(1) The practice of requiring surety for the due performance of duties and obligations has existed from a very early period; for we find in Genesis (chap. xlii), that when Joseph sent back his brethren to their father's house to bring Benjamin to him, Simeon was retained as surety.

Suretyship has at all times been looked upon as attended with dangers. Solomon, in various parts of the Proverbs, declaims against becoming surety: "Be not thou," he says, "one of them that strike hands; or of them that are sureties for debts." (xxii. 26.) And, "A man void of understanding striketh hands, and becometh surety in the presence of his friend." (xvii. 18.) And, "He that is a surety for a stranger shall smart for it; and he that hateth suretyship is sure." (xi. 15.) Erasmus, in his *Adagia*, records a saying, attributed by some to Thales, by others to Pittacus, (see Stobæus, Serm. 3; Diog. Laertius, Segm. 40, lib. 1; Hyginus Fab. 221,) illustrative of the dangers consequent on becoming surety, "*Sponde, noxa præsto est.*" Amyot has concisely expressed the opinion of the French upon this point, in the words "*Qui repond, paye.*" And, probably, there are few nations without some proverb, or saying, expressive of their conviction, that loss follows suretyship.

the debt, default, or miscarriage of another. To make this contract binding, certain formalities (which will be subsequently noticed) are, by the Statute of Frauds (*a*), required to be observed. If these requisites are complied with, the nature of the instrument is immaterial; it may be by a writing under seal, as a deed, or a bond; or by a writing not under seal, as a memorandum, note, or letter. Those instruments which are not under seal, are usually termed guarantees, though every contract of suretyship is, substantially, and in fact, a guarantee.

CHAPTER II.

OF PROMISES WHICH ARE WITHIN THE STATUTE OF FRAUDS.

THE 4th section of the Statute of Frauds (*b*), enacts, that “no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

The object of the legislature in framing this section of the statute, seems to have been, that a person who undertakes to do that which by law he is not bound to perform, namely, to pay a debt which another has contracted, or which another is about to contract; or to be answerable for another's default, or miscarriage, shall not be made charge-

(*a*) 29 Car. II. cap. 3.

(*b*) *Ibid.*

able, unless his undertaking be reduced into writing (c) (2).

An exception, however, to the rule, that an undertaking by one person for the debt, default, or miscarriage of another, shall be ineffectual unless reduced into writing, has been made in the case of an attorney, who, acting in that character, *verbally* promised to pay the debt of a third party (the promise having been founded on a good consideration); in that case, the Court, in its jurisdiction over attorneys, compelled the attorney to perform his undertaking, and would not allow him to take advantage of his own wrong (d).

A promise which is within the statute, and which requires the formalities above-mentioned to give it effect, is called a *collateral* promise, because the promise is in aid of, or collateral to, the liability of the principal debtor, or the person in whose favour the promise is given; and the person to whom the

(c) See the observations of C. J., in *Castling v. Aubert*, 2 East, 325.
Bayley, J., in *Edwards v. Kelly*, 1 M. & Sel. 204; of *Best, J.*, in *Kirkham v. Marter*, 2 B. & Ald. 613; and of Lord *Ellenborough*,
 (d) In *re Greaves*, 1 Cr. & J. 374 n.

(2) Although a person who has engaged to be responsible for the debt, default, or miscarriage of a third party, be not, by reason of the undertaking not being reduced into writing, liable to the person to whom such undertaking is given; yet, if from the transaction it can be collected that an authority was given by the person undertaken for, to the person giving the undertaking, to make good the engagement in case the person undertaken for, fails on his part to perform it, the person giving the undertaking, though not liable at the suit of the person to whom it was given, may, nevertheless, after default by the person undertaken for, and until such authority is retracted, make good such engagement, and will have his remedy over against the party undertaken for; thus, where D., being in want of goods, went to C., accompanied by J. S., and ordered goods, J. S. saying, in D.'s presence, that he would pay the money if D. did not, and the goods were furnished by C. to D.; it was held, that J. S. thereby acquired an authority to pay the money on the default of D.; and that having paid it, he was entitled to recover it back from D., as money paid and supplied to D.'s use; the authority not being shown to have been countermanded. (*Alexander v. Vane*, 1 Mess. & W. 511.)

promise is given has a remedy against both the person giving the promise, and the principal debtor, or the person in whose favour the promise is given, and who is primarily liable. But if a person should promise for the debt, default, or miscarriage of another, and such other be not himself liable, then the promise is not a promise in aid, or a collateral promise, but is an *original* promise on the part of the person giving it, and is not within the statute.

A collateral promise, or a promise within the Statute of Frauds, must be,

I. An undertaking either for the debt, default, or miscarriage of a person, other than the person giving the promise; and the person giving the promise must be liable out of his own funds. And,

II. The person in whose favour the promise is given, must be liable as well as the person giving the promise.

1st. The undertaking must be for a debt, default, or miscarriage.

Many cases have arisen upon the question, what the legislature intended by the words "*debt, default, or miscarriage.*" If a tradesman is requested to supply one with goods, which he agrees to do upon the undertaking of a third party to pay for them, if the party requiring the goods does not, and the goods are *subsequently delivered*, it is a promise to pay a *debt* within the meaning of the statute, though *at the time when the undertaking was given*, there was no *debt* due to the tradesman, for which the surety engaged to be answerable (e). And it makes no difference that the contract is entered into between the tradesman and intended purchaser, before the guarantee is given, if the delivery of the goods is pos-

(e) *Matson v. Whoram*, 2 T. R. 80; *Jones v. Cooper*, Cowp. 227; *S. C. Lofft.* 769; *Rains v. Storry*, 3 Car. & P. 130; *Langdale v. Parry*,

2 Dowl. & Ry. 337; *Mines v. Sculthorpe*, 2 Camp. 215; *Peckham v. Faria*, 3 Doug. 13.

terior to the giving of the guarantee ; since the sale of the goods is not complete till the delivery (*f*). Thus, where a person being indebted to another in a sum of money, for the recovery of which the creditor had commenced an action (*g*); or where judgment having been obtained by the creditor in an action (*h*), in consideration that the plaintiff would stay proceedings, and compound the action, a third party promised to pay the money owing to the creditor by the debtor ; the promise was held within the statute. So where the parties to a chancery suit agreed that it should be put an end to, and the plaintiff's solicitor having objected that his costs were unpaid, an arrangement was entered into between the plaintiff and defendant, with the consent of the solicitor, that the defendant should pay the plaintiff's solicitor's costs to the solicitor himself, instead of paying them to the plaintiff in equity : such an undertaking by the defendant in equity, was held an undertaking to pay the debt of another, and within the statute (*i*). So where P. and S. (3) went to the plaintiff's house, and agreed on a parcel of goods for P., upon which occasion the plaintiff said he knew nothing of P., and asked S. if he would answer for him, who replied, he would guarantee the payment of the goods ; and P. afterwards went alone and ordered other goods, when the plaintiff sent to S. and asked him whether he would engage for P., and S. replied, that he would pay if P. did not, the promise was held to be collateral (*j*). So

(*f*) *Simmons v. Keating*, 2 Stark. 426.

(*g*) *Fish v. Hutchinson*, 2 Wils. 94.

(*h*) See in *re Greaves*, 1 Cr. & J. 374 n.

(*i*) *Tomlinson v. Gell*, 6 Ad. & Ell. 564.

(*j*) *Peckham v. Faria*, 3 Doug. 13.

(3) Throughout these pages the letter P. is generally put for the principal ; the letter S. for the surety ; and the letter C. for the creditor, or the person to whom the guarantee is given.

where certain business had been commenced by C. on P.'s account, in respect of which business P. had advanced C. a certain sum, and the money being almost exhausted, C. refused to go on with the proceedings unless a further supply of money was paid to him, and S. thereupon replied, he knew how serious the business was, and that if C. would proceed, he would pay him whatever was to be paid: such a promise requires to be in writing (*k*). So where the declaration stated that A. had wrongfully, and without the leave or licence of B., ridden his horse, and thereby caused its death, a promise by a third party to pay the damage thereby sustained, in consideration that B. would not bring any action against A., was held a collateral promise (*l*); the word "miscarriage" com-

- (*k*) *Barber v. Fox*, 1 Stark. 270. Ald. 613, overruling *semble Read*
 (*l*) *Kirkham v. Marter*, 2 B. & v. Nash, 1 Wile. 305, (4).

(4) The promise in the case of *Read v. Nash*, was given under the following circumstances:—An action of assault and battery had been brought by the plaintiff's testator, against one Johnson. The cause was just coming on to be tried, when the defendant Nash being present in court, in consideration that the plaintiff's testator would not proceed to try his cause, but would withdraw the record, promised to pay him 50*l.*, and costs to be taxed in that suit; and this promise was held not to be within the Statute of Frauds.

Abbott, C. J., before whom the cause of *Kirkham v. Marter* was tried at *Nisi Prius*, thought the promise given in that case was an undertaking for the default, or miscarriage of another, within the meaning of the Statute of Frauds, and consequently ought to have been in writing; and not being in writing, he nonsuited the plaintiff. Upon a motion made for a new trial, the learned Judge being pressed with the case of *Read v. Nash*, observed, "The case of *Read v. Nash* is very distinguishable from this; the promise there, was to pay a sum of money as an inducement to withdraw a record in an action of assault brought against a third person. It did not appear that the defendant in that action had ever committed the assault, or that he had ever been liable in damages Here, the son had rendered himself liable by his wrongful act; and the promise was expressly made in consideration of the plaintiff's forbearing to sue the son."

The learned editors of the late edition of Saunders's Reports have observed, (Vol. I. p. 211, b. n. i.) that, "notwithstanding Abbott, C. J., in delivering his judgment, in *Kirkham v. Marter*, distinguished it from *Read v. Nash*, the former case has in effect overruled the latter;

prehending that species of wrongful act, for the consequences of which the law would make the party civilly responsible, and a promise by a third party to answer for the damages thereby incurred, was within the mischief contemplated by the legislature, though not a promise to answer for another with respect to the non-performance of a duty founded upon a contract. But an undertaking to

for if in the one case, it did not appear that the third person was liable for the alleged assault, neither does it appear in the other, that A. was liable for the death of the horse, except indeed by the admission of the defendant to that effect, contained in his request to the plaintiff to forbear from suing A.; and the admission of the defendant in *Read v. Nash*, that the third person was liable for the alleged assault contained in his request to the plaintiff, not to continue his suit, is equally strong. In like manner, if it be said that, in *Read v. Nash*, the defendant in the original action might have obtained a verdict; so in *Kirkham v. Marter*, if an action had been brought, *non constat* that A. might not have proved that he had leave given to him to take and ride the horse, and that the horse had died from some other cause than that which was alleged."

It certainly appears difficult to discover a dissimilarity between the two cases, however disposed we may be to acquiesce in the correctness of the judgment in *Kirkham v. Marter*, and to think that the case of *Read v. Nash* fell within the spirit of the act. From the earlier reports it would seem, that the courts were desirous of excluding cases from, rather than, if possible, bringing them within, the operation of the statute, the wise provisions, and beneficial effects of which, have been dwelt upon, and commended by a variety of our most eminent judges. Lord Mansfield, it seems, at one time thought, that if goods were supplied *after* the promise was given, though they were supplied on the faith and in consequence of that promise, the undertaking was not within the statute; because at the time of the promise, there was no *debt* for which the party promising engaged to be answerable.—(See *Mowbray v. Cunningham*, Cowp. 227, cit.) And the rule or test, which is laid down in some of the earlier cases, for distinguishing between an original and a collateral undertaking, (see *Watkins v. Perkins*, 1 Ld. Raym., 224; *Burkmire v. Darnell*, Holt, 606; *S. C.* 1 Salk. 27; *S. C.* 6 Mod. 248,) seems to be (having regard to the object of the statute) still further removed from its principle. In *Tomkinson v. Gill*, (Ambl. 330,) Lord Hardwicke thought the distinction taken in *Burkmire v. Darnell* was "a very slight and cobweb distinction;" and in a modern case, (*Rains v. Storry*, 3 Car. & P. 130,) Best, J. has observed, that "the decisions on the subject run very fine," and it may be doubted whether the legislature, by the comprehensive words "debt," "default," or "miscarriage," did not intend to include a larger range of promises, whereby the party promising derived no benefit, than the cases which have been decided upon this subject admit.

sign a bail bond for a defendant, in an action which had been brought against him, provided the plaintiff would forbear to arrest him(*m*); or to indemnify a person against the consequences of defending an action(*n*); or to get a guarantee (which had been settled and arranged by the parties) signed by a certain specified person, and to deliver it to the plaintiffs, upon condition that the plaintiffs (who were the owners of a ship hired on charter party, and refused to let her sail, until certain disputes about the freight between them and the charterer were settled, without first giving security) would, without taking the demanded security, remove the stop they had put upon the vessel, and permit her to sail on the voyage(*o*); or to indemnify a person against the effect of having entered into a bond as surety for a third party (the promise not being made to the creditor, but the surety)(*p*); or to repay a sum of money which had been paid by one at the request of the party giving the undertaking(*q*); have been held to be original promises, and not within the statute.

2ndly. The undertaking must be for the debt, default, or miscarriage of a person, other than the person giving the promise.

If the subject of the promise by the party undertaking is to pay a debt incurred, or to be answerable for a default, it must be the debt, or default of *another person*, and not the party's own debt or default; thus, if A. is indebted to B. in a certain and ascertained sum, and B. is indebted to C. in the same sum, and it is agreed between A. B. and C., that C. shall take A.'s debt, a promise by A. to pay C., is

(*m*) *Jarmain v. Alger*, 2 Car. & P. 249; S. C. 1 Ry. & M. 348.

(*n*) *Howes v. Martin*, 1 Esp. 162; *Adams v. Dansey*, 6 Bing. 506.

(*o*) *Bushell v. Bevan*, 1 Bing. N. C. 103.

(*p*) *Thomas v. Cook*, 8 B. & Cress. 728; S. C. 3 Man. & Ry. 444.

(*q*) See the observations of Parke, J., in *Thomas v. Cook*, *supra*.

not within the statute, and therefore need not be in writing, inasmuch as it is a promise to pay A.'s own debt, and not that of another (*r*). So where an action was brought against an attorney *and two others*, for appearing for the plaintiff without a warrant, and the cause being carried down to be tried at the assizes, the defendant (the attorney) promised, in consideration that the plaintiff would not prosecute the action, he would pay 10*l.* and costs of suit. Upon an action brought against the attorney upon the promise, it was held to be a promise by the defendant for his own debt, and therefore not within the statute (*s*). So, if money is lent to the wife at the request of the husband, it is the same in law as if it had been lent to the husband himself, for a loan to the wife at the husband's request is a loan to the husband (*t*). So where the declaration stated that the defendant sold to the plaintiff a bay gelding for eight guineas, and on the sale, agreed that, in consideration that the plaintiff had paid the eight guineas, the defendant promised to the plaintiff that if he did not like the gelding, and delivered it to A. to the defendant's use, that A. should pay the said eight guineas to the plaintiff, and that if A. did not pay the eight guineas, the defendant would repay them on request; and that the plaintiff did not like the gelding, but delivered it to A., and requested him to pay the eight guineas, which he refused to do: it was held that the promise was not a collateral promise to pay in default of another, but was

(*r*) *Hodgson v. Anderson*, 3 B. & Cress. 842; *S. C.* 5 Dowl. & Ry. 735; *S. P. Crowfoot v. Gurney*, 9 Bing. 372; *Wilson v. Coupland*, 5 B. & Ald. 228; *Oble v. Dittlesfield*, 1 Ventr. 153; *Lacy v. M'Neile*, 4 Dowl. & Ry. 7; *Israel v. Douglas*, 1 H. Blk. 239; *Fairlie v. Denton*, 8 B. & Cress.

395; *S. C.* 2 Man. & Ry. 353; and see the observations of Buller, J., in *Tatlock v. Harris*, 3 T. R. 174.

(*s*) *Stephens v. Squire*, 5 Mod. 205; *S. C. nom Stevens v. Squire*, Comb. 362.

(*t*) *Stevenson v. Hardie*, 2 Blk. 872; *S. C.* 3 Wils. 388.

in effect a contract of sale ; that the plaintiff bought the gelding conditionally, that if he did not like him he should receive back his money, and when the condition was performed by the dislike of the gelding, and the returning it to A., the bargain was void and at an end, and the money was in the hands of the defendant as a debtor to the plaintiff, as money received to the plaintiff's use, and A. was no more than a servant to receive the gelding and to repay the money, and that A. not repaying the money, the defendant, as master, was debtor (u). So where J. S. having undertaken to complete the carpenter's work in the defendant's house, and to find all materials, and being unable to procure timber for that purpose, it was supplied by the plaintiff on the following undertaking, signed by the defendant, "I do agree to pay A. B., (the plaintiff,) 50*l.* for timber to house in Annett's Crescent, out of the money I have to pay J. S., provided J. S.'s work is completed." It was held that this was not a collateral but a direct undertaking, and that it was immaterial to the defendant whether the work was done by J. S., or by any other person (v). So where A. had, for the accommodation of B., accepted a bill of exchange, and the same not being paid when due, the holder had brought his action against A. as the acceptor, and B. being made acquainted with the circumstance, desired A. to defend the action, representing to A., that as she had received no consideration for the acceptance, she might safely do so ; and in consequence of such direction, A. defended the action and failed : it was held that B. was liable to pay the expenses of the defence, and that the case was not within the statute ; for the action was

(u) *Masters v. Marriott*, 3 Lev. 363.

(v) *Dixon v. Hatfield*, 2 Bing. 439 ; S. C. 10 J. B. Moo. 42.

one in which B. was concerned, and might have been benefited by the event(w). But where a landlord of certain premises, in respect of which rent was due, gave a warrant to his broker to distrain upon the tenant, and the defendant being a creditor of the landlord, paid the broker, and took the plaintiff down to the premises to keep possession of the goods, and promised to pay him for so doing, and also to repay him sums to be advanced by him to

(w) *Howes v. Martin*, 1 Esp. 162, (5).

(5) The case of *Winckworth v. Mills*, (2 Esp. 484,) which was decided by the same learned Judge who decided *Howes v. Martin*, very closely resembles the latter case. The circumstances in *Winckworth v. Mills* were as follows: The plaintiff was the indorsee of one Brough, who was the indorsee of the defendant, who was himself the indorsee of Taylor & Son, of a promissory note drawn by one Sharp in favour of Taylor & Son for 60*l.*, payable three months after date at Taylor's house. When the note became due, the plaintiff's clerk called for payment at Taylor's house, but the note was not paid, and the clerk, by mistake, left it at Taylor's house; he immediately returned, and informed Taylor & Son of the circumstance, and demanded it, but they denied having it, and it was considered as lost. The plaintiff and Brough immediately waited on the defendant, and informed him of the circumstance, whereupon he furnished them with a copy of the note, and promised, if they would endeavour to recover the amount of it from Taylor & Son, that he would indemnify them. They applied to Sharp, whom they found was a man of no substance. They afterwards applied to Taylor & Son, and they, on being threatened, paid 30*l.* in part, and gave a new security by a note for the remaining 30*l.* This last note not being paid when due, an action was brought on it against Taylor & Son, and a judgment obtained on it by default. Taylor & Son then brought a writ of error on the judgment, and afterwards became bankrupts. Upon this, Winckworth, the plaintiff, brought his action to recover from Mills, the defendant, the expenses he had been put to in endeavouring to recover the money from Taylor & Son, on Mills' promise of indemnifying him, and added a count against him as indorser of the original note. Lord Kenyon asked, if there had been any note in writing from Mills to the plaintiff, promising to indemnify him in the manner stated; and on being answered in the negative, his Lordship then added, that he was of opinion the action could not be supported to recover that part of the demand claimed under the promise of indemnity; that it was a promise for the debt and default of another, and so could not, under the Statute of Frauds, be maintained without a note in writing; but as to the unpaid part of the original note, the plaintiff was entitled to recover it. The counsel for the plaintiff seeming to be dissatisfied with his Lordship's ruling, he offered to save the point, but they declined it.

the person who was in possession of the goods distrained; Lord Ellenborough was of opinion, that since there was a principal, namely, the landlord who was responsible for the necessary expenses of the distress, the case was within the Statute of Frauds, and that the debt was to be considered as the debt of another, and consequently the defendant could not be liable without a note in writing (*x*).

3rdly. The person giving the promise must be liable out of his own funds.

A promise by one to pay the debt of another out of the debtor's own funds, when they shall come to the hands of the party promising, upon receiving the debtor's directions for that purpose, is not within the operation of the statute, it not being an undertaking by the party promising to be answerable for the debt of another, but only faithfully to apply the funds of the debtor, and is therefore not within the mischief contemplated by the act: thus, where the declaration stated that A. was employed to do work on certain houses, and that the defendant was employed as surveyor over him, and to receive monies to be paid to A. for such work; and that in consideration that the plaintiff would provide and deliver to A. such materials as should be required to enable him to do the work, the defendant promised the plaintiff to pay him for them out of such monies received by him as should become due to A. for the work, if A. would give him an order for that purpose; with an averment that A. gave the defendant such order, and that he required certain materials which the plaintiff provided and delivered to him to the value of 1,000*l.*, and that that sum became due to A. for the work, and that the defendant was requested by the plaintiff to pay him for the materials out of such monies received by him as were due to

(*x*) *Colman v. Eyles*, 2 Stark. 62.

A. for the work ; and that although the defendant had received 1,000*l.* to be paid and then due to A., and although the said order had not been revoked, the defendant refused to pay the plaintiff. To a plea put in, that the promise in the declaration mentioned was a special promise to answer for the debt of A., and that there was no memorandum or note thereof in writing, it was held, on demurrer, that the plea was bad, for the defendant's promise was an original, and not a collateral one (y).

II. The person undertaken for, or in whose favour the promise is given, must be liable as well as the person giving the promise, or the promise is not a collateral promise.

The person undertaken for, or in whose favour the promise is given, may, 1st, never have been liable ; or, 2ndly, having at one time been liable, he may, from the effect of the promise, cease to be so : in either case the promise is an original promise.

1st. He may never have been liable owing to his incapacity to incur responsibility ; as where he is an infant, and the money advanced for his benefit (in consequence of a promise by a third party) is in respect of matters for which the law would not make the infant liable, being for things other than necessities (z) ; or from an inability on the part of the person giving the promise, to make the person undertaken for liable ; as where the attorneys for the plaintiff and the defendant, in a cause which was ready for trial, entered into an agreement without the knowledge of their principals, whereby they undertook that the record should be withdrawn, that certain things should be done by the plaintiff and the defendant, and that costs should be taxed

(y) *Andrews v. Smith*, 2 Cr. M. & Ros. 627 ; and see *Dixon v. Hatfield*, 2 Bing. 439 ; *S. C.* 10 J. B. Moo. 42 ; and *Parkins v. Moravia*,

1 Car. & P. 376.

(z) *Harris v. Huntback*, 1 Burr. 373.

for the defendant in a certain manner ; it was held, that the attorney for the plaintiff was personally bound to pay the costs when taxed in the mode specified, and could not be considered as a surety for his client, as his client was not bound by that arrangement (a). So where the solicitors of the assignees of a bankrupt tenant, upon whose lands a distress had been put in by the landlord, gave the following written undertaking :—" We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it does not exceed the value of the effects distrained." It was held, the solicitors were personally liable ; for as solicitors they had no power to pledge the credit of their clients, and consequently could not bind the assignees (b). So where a person represented to a publican that he had authority from the committee of one of the electioneering candidates of a borough, to open the publican's house for the entertainment of voters in the interest of such candidate, and promised the publican to see him paid, and the publican, relying upon the representations so made, opened his house, and afterwards sent in his bill to the committee, before making any demand upon the other party, to whom ; however, the publican wrote a letter requesting his good offices to get his bill discharged ; and it appeared in evidence, that the committee had not authorized the party at whose solicitations the house had been opened, to act as he had done ; it was held, that the promise was not within the statute (c). So where it appeared that the defen-

(a) *Iveson v. Conington*, 1 B. & Cress. 160 ; *S. C.* 2 Dowl. & Ry. 307. 47 ; and see *Hall v. Ashurst*, 1 Cr. & Mees. 714.

(c) *Thompson v. Bond*, 1 Camp. 4, (6).

(6) The plaintiff in this case brought *assumpsit* for work and labour, goods sold, &c., to recover the sum of 45*l.* from the defendant, for having, at the defendant's instance, employed himself in canvassing

dant's brother employed the plaintiff to sell a considerable estate for him in Ireland, and that the

for the Right Hon. R. B. Sheridan, one of the candidates for the borough of Westminster, and opened his house for the entertainment of voters in the interest of such candidate. For the defendant it was contended, that the undertaking being a collateral promise to pay the debt of another, and not being reduced into writing, was void under the Statute of Frauds. For the plaintiff it was contended, that whatever might have originally passed between the parties, the plaintiff was, at all events, entitled to recover the whole of his demand; for even supposing the plaintiff had given credit to the committee, still, as they had not authorized the defendant to act as he had done, they were not liable; and as it was certain an action must lie against some one, this was the debt of the defendant alone, and he was personally responsible for it in that action. Lord Ellenborough expressed himself as follows: "The undertaking of the defendant seems to have amounted to this, that he would see the plaintiff paid, which, in consideration of law, is only a collateral promise to pay the debt of another; and had he been authorized by the committee, as he represented, so that they would have been liable, it would beyond all question have been void for not being reduced into writing. But it now appears, that he had no orders from the committee to open the house, and that he had no authority, as their agent, to employ the plaintiff; still I am of opinion, that the plaintiff cannot enforce his demand in the present action. If I represent that I have an order from A., when I have no such order, and so induce a person to deal with me on the credit of A., I am not principally liable as for a debt of my own; an action may be brought against me for the deceitful representation, by which this person was induced to give credit to A., but he cannot recover as upon a contract which was never entered into. So here, though the defendant may be liable in a different form of action, he cannot be considered as a debtor for goods sold to the extent of the plaintiff's demand; as it appears, however, that the defendant himself frequently partook of the refreshments in the plaintiff's house during the election, it will be necessary to decide, whether these were furnished to him on his own personal credit, or on the general representation, that the committee desired the house to be opened for the candidate's friends. In the former case, the defendant will be liable in this action to the amount of his own consumption; but in the latter, which, under the circumstances, seems the more probable case, he is entitled to a verdict on the whole declaration." The jury found a verdict for the plaintiff, with 10*l.* damages.

By the 6th section of the statute 9 Geo. 4, cap. 14, (commonly called Lord Tenterden's Act,) no action can be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon such representation or assurance, unless such representation or assurance be made in writing, and signed by the party to be charged therewith. It seems a question, therefore, whether an action would

plaintiff gained his livelihood by doing business of that nature, and that accordingly the plaintiff attended the Earl of Shelburn several times on the subject of a proposed purchase by him of this estate, and that pending this transaction, the defendant wrote a letter to the plaintiff in the following words:—"My brother desires to treat with Lord Shelburn for selling him the late Mr. Bagnall's estate in Ireland, and if he goes on with the purchase, you may depend upon a handsome gratuity from my brother, which I assure and promise you shall not be less than 300*l*." There was a postscript to the following effect:—"My intention is that the money shall be paid you upon executing the writings." The plaintiff afterwards concluded the purchase, and having obtained a verdict for the 300*l*., upon a motion for a new trial the Court thought it clear that no action could lie upon this promise against the defendant's brother, because it by no means appeared that the defendant had any authority from him to write this letter, by which the promise was made, but the defendant himself was bound to perform it; for he had expressly undertaken that the promise should be performed (*d*). So where one covenanted for himself, his heirs, &c. under his hand and seal, for the act of another, he was held to be personally liable, though he described himself in the deed as covenanting for, and on the part and behalf of, such other person: the Court observing that there was nothing against law

(*d*) *Gordon v. Martin*, 2 Barnard. 13; and see *Redhead v. Cator*, 1 Stark. 14.

now lie against the defendant for the deceitful representation, for the reason, that the representation or assurance was not reduced into writing; and unless, therefore, such an undertaking could be considered as an original undertaking, the plaintiff would have *at law* no means of recovering the charges and expenses he had been put to in consequence of the defendant's promise.

in it, if he would bind himself for his principal, he probably consented to it upon an indemnity(e).

Again : The person undertaken for, or in whose favour the promise is made, may never have been liable, from there being no privity between him and the person receiving the promise ; in which case the promise is an original promise (f) (7) : or from

(e) *Appleton v. Binks*, 5 East, 148.

(f) *Houlditch v. Milne*, 3 Esp. 86, and see *supra*.

(7) The case of *Oldham v. Allen*, referred to by Bayley, B., in his judgment in *Simpson v. Penton*, as it is stated in the second volume of Messrs. Crompton and Meeson's Reports, (p. 433,) is at variance with the proposition above laid down ; but it is submitted with much deference, that a material ingredient is omitted in the statement of that case, if the undertaking was, as it is said to be in those reports, in part original and in part collateral ; the case, as stated, shows the undertaking to be, (according to the author's view of the case,) *wholly an original one*.

The report is in these words : " The defendant had sent for a farrier to attend some horses, and said to the farrier, ' I will see you paid.' The plaintiff (the farrier) knew the parties who were owners of some of the horses, and made them debtors, but debited the defendant for the others, whose owners he did not know : the Court held that the promise was original in respect of those owners whose names he did not know ; but in respect of the others, whom he did know, that it was collateral."

For any thing, therefore, that appears from this statement, there had been no communication between the farrier and the owners of those horses whom the farrier happened to know, and whom he had debited in his books : it was not by their direction that the farrier had been called in to attend those horses,—their owners had never (at least for any thing that appears) pledged their credit with the farrier, and *non constat* they might have preferred not to have had his assistance : the circumstance of the farrier's having made the owners debtors, could not, *without their privity*, make them responsible, and unless there was privity, the undertaking, it is submitted, was in no part collateral.

The decision in *Houlditch v. Milne*, seems to fall within the principle above laid down, though from the observations attributed to Lord Eldon, it may be considered to be referable to another principle. The case in evidence was, that carriages belonging to a Mr. Copey had been *sent by the defendant to the plaintiff* to be repaired, and that the defendant had given the plaintiff orders respecting them : the bill for the repairs, which was the subject of the action, was made out in the name of Copey. When the carriages were repaired, the defendant sent an order to pack them up, and send them on board ship. The plaintiff upon this sent to the defendant to know who was to pay for them ; the defendant said he had sent them, and he would pay for them. In consequence of this, the carriages were packed up

the conduct of the person receiving the promise, in electing to make the promise an original promise, by trusting *solely* to him who gives the promise or undertaking, and *giving no credit whatever to him for whose use or benefit it was given (g)*; thus, if A.

(g) *Croft v. Smallwood*, 1 Esp. 121; *Edge v. Frost*, 4 Dowl. & Ry. 243; and see Lord Eldon's observations in *Houlditch v. Milne*, *supra*; and the judgment in *Birkmyr v. Darnell*, 1 Salk. 27; *S. C.* 3 Salk. 15; but see *Colman v. Eyles*, *supra*.

and sent on board ship, and the bill was made out and delivered to the defendant; he desired time to look over it, and when the plaintiff's clerk called a second time, he said the charges appeared very high, but desired the clerk to call in a few days, and he would settle it. Not having done so, the plaintiff's attorney waited upon him, when he said he was told the bill was a most exorbitant one, and a fit subject to refer: he, however, said he had the money to pay it, but did not say whether his own or Mr. Copey's. For the defendant it was contended, that the plaintiff must be nonsuited, upon the principle, that if Mr. Copey was at all liable, the undertaking of the defendant must be in writing; and that Mr. Copey was liable must be taken to be the fact, as the bill sent to the defendant was made out in Copey's name, and contained charges for work done (as it must be presumed) by Copey's own order. Lord Eldon, after stating he was not disposed to nonsuit the plaintiff, observed, that in general cases, to make a person liable for goods delivered to another, there must be either an original undertaking by him, so that the credit was given solely to him, or there must be a note in writing: there might, however, his Lordship observed, be cases to which this rule did not apply. If a person got goods in his possession on which the landlord had a right to distrain for rent, though it was clearly the debt of another, yet a note in writing was not necessary; it appeared, his Lordship observed, to apply precisely to that case. The plaintiffs had, to a certain extent, a lien upon the carriages, which they parted with on the defendant's promise to pay; *that, he thought, took the case out of the statute*, and made the defendant liable for the amount of the bill.

The latter words of his Lordship seem to imply, that the case was at one time within the statute; or, in other words, that Mr. Copey was, previous to the delivering up of the carriages to the defendant, liable to the plaintiff for the repairs. But how did Mr. Copey ever make himself liable? It is true, that it was in evidence that one of the carriages had been bought by Mr. Copey, and paid for by him, but it does not appear from the report, that Mr. Copey ever in any manner pledged, or gave the defendant authority to pledge, his credit with the plaintiff; and if such was the case, Mr. Copey was at no time liable to the plaintiff, and the promise, therefore, *was never within* the statute. (See the observations of the editors of Williams's edition of Saunders's Reports, vol. 1, p. 211, c. n. i., on this case, but which, however, do not seem, from what fell from Mr. Justice Williams, in *Clancy v. Piggott*, 2 Ad. & Ell. 473, to have met with that learned Judge's approbation.)

introduces B. to C., a tradesman, and asks C. if he will supply B. with goods in the way of his trade, and that if he will, he (A.) will be answerable, and C. agrees, and the order is given, and the goods supplied accordingly, and C. enters the name of A. in his books as his debtor, and makes no application to, and never requires payment from, B., but when the usual time of credit has expired, applies to A. for payment; the contract between A. and C. is an original contract, and need not be in writing (*h*), and it is immaterial whether the person giving the promise receives any benefit or not from it (*i*). If, however, goods are supplied to one, upon the credit of a third party, *and such third party is a public officer, or agent of government, having the possession or control of funds with reference to which he promises payment, and these facts are known to the persons who supplied the goods*, it seems that such third party will not, *in general*, be considered as having made himself *personally* responsible to the party who supplied the goods, although the party to whom the goods were supplied, may never have been liable to him who supplied them (*j*), and notwithstanding the opinion of a jury may have been unfavourable to such third party, by declaring that credit was given to the individual *personally*, and that the creditor did *not* look to the fund over which such officer or agent had, or was supposed to have, dominion (*k*); at all events, the Court will feel disposed (in the absence of any written stipulation between the parties, and where the circumstances of the case may reasonably lead to the conclusion that

(*h*) See *Simpson v. Penton*, 2 Cr. & Mees. 430; *Oldham v. Allen*, 2 Cr. & Mees. 433, cit., and cases referred to.

(*i*) *Simpson v. Penton*, *supra*; *Edge v. Frost*, 4 Dowl. & Ry. 243.

(*j*) See *Macbeath v. Haldimond*,

1 T. R. 172; *Prosser v. Allen*, Gow, 117; and the observation of Abbott, C. J., in *Burrell v. Jones*, 3 B. & Ald. 47.

(*k*) *Prosser v. Allen*, *supra*; *Keate v. Temple*, 1 Bos. & P. 158.

the fund, and not the third party, was looked to for payment) to give the third party the benefit of another trial(4). But if the tradesman, *where there*

(4) *Keate v. Temple, supra*, (8).

(8) The case of *Keate v. Temple* was as follows:—The plaintiff was a tailor and slopseller at Portsmouth, and the defendant the first lieutenant of H. M. S. The Boyne. When the ship came into port, the defendant applied to a third person to recommend a slopseller who might supply the crew with new clothes, saying, "He will run no risk; I will see him paid." The plaintiff being accordingly recommended, the defendant called upon him, and used these words, "I will see you paid at the pay-table; are you satisfied?" The plaintiff answered, "Perfectly so." The clothes were delivered on the quarter-deck of the Boyne; slops are usually sold on the main deck. The defendant produced samples to ascertain whether his directions had been followed; some of the men said they were not in want of any clothes, but were told by the defendant that if they did not take them he would punish them; and others, who stated that they were only in want of part of a suit, were obliged to take a whole one. Soon after the delivery, the Boyne was burnt, and the crew dispersed into different ships; on that occasion the plaintiff having expressed some apprehensions for himself, was told by the defendant, "Captain Grey (the captain of the Boyne) and I will see you paid; you need not make yourself uneasy." After this, the commissioner came on board the Commerce de Marseilles, in order to pay the crew of the Boyne; at which time the defendant stood at the pay-table, and having taken some money out of the hat of the first man who was paid, gave it to the plaintiff; the next man refused to part with his pay, and was immediately put in irons. The defendant then asked the commissioner to stop the pay of the crew, who answered that it could not be done. The learned Judge, in his direction to the jury, said, that if they were satisfied on the evidence that the goods in question were advanced on the credit of the defendant as immediately responsible, the plaintiff was entitled to a verdict; but if they believed that at the time when the goods were furnished, the plaintiff relied on being able, through the assistance of the defendant, to get his money from the crew, they ought to find for the defendant. A verdict was found for the plaintiff for the sum of 576*l.* 7*s.* 8*d.* On a motion for a new trial, (which was granted,) Eyre, C. J., said, "There is one consideration, independent of every thing else, which weighs so strongly with me, that I should wish this evidence to be once more submitted to a jury. The sum recovered is 576*l.* 7*s.* 8*d.*, and this against a lieutenant in the navy; a sum so large that it goes a great way towards satisfying my mind, that it never could have been in the contemplation of the defendant to make himself liable, or of the slopseller to furnish goods on his credit to so large an amount; I can hardly think that had the Boyne not been burnt, and the plaintiff been asked whether he would have the lieutenant, or the crew for his paymaster, but that he would have given the preference to the latter. From the nature of the case, it is apparent that the men were to pay in the first instance; the defendant's words were, 'I will see you paid at the pay-table; are you satisfied?' and the answer was, 'Perfectly so.' The meaning of which

has been any privity between him and the person to whom the goods have been furnished, give any credit whatever to such person (m); then the promise is

(m) *Matson v. Wharam*, 2 T. R. 1 Stark. 270; and the observations of Holt, C. J., in *Austen v. Mines v. Sculthorpe*, 2 Camp. 215; *Anderson v. Hayman*, 1 H. Blk. 120; and see *Rains v. Storry*, 3 Car. & P. 130; *Barber v. Fox*, 2 Cr. & Mees. 430.

was, that, however unwilling the men might be to pay themselves, the officer would take care that they should pay. The question is, whether the slopman did not rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund rather than to the lieutenant, who, if we are to judge of him by others in the same situation, was not likely to be able to raise so large a sum. Considering the whole bearing of the evidence, and that the learned Judge who tried the cause has not expressed himself satisfied with the verdict, I think this a proper case to be sent for a new trial."

If this case, therefore, were to be tried by the ordinary rules applicable to the cases of principal and surety, the defendant would have been held liable. The jury had declared that credit had been given to the defendant, and it cannot for a moment be maintained that the men individually were liable to the slopseller; many of them, indeed, had expressed themselves unwilling to receive the clothes; thus, according to the finding of the jury, goods are supplied by A. to B., at the request, and upon the credit, of C.; and consequently if B. is not liable to A., it is an original contract between A. and C. The rule for a new trial, however, proceeded upon the ground that the plaintiff looked for payment to the fund rather than to the defendant, which seems borne out by the evidence; "I will see you paid at the payable; are you satisfied?" and the answer was, "Perfectly so."

The case of *Lyde v. Higgins*, (1 Smith, 305,) which was decided a few years after *Keate v. Temple*, nearly resembles the latter case, and the judgment of the Court of King's Bench was, (and, as it would seem, a proper one,) that the promise was an original promise. The circumstances in *Lyde v. Higgins* were as follows:—A surgeon attended a pauper for some time, giving credit to the pauper's father for payment of his bill; but the father becoming unable to pay, and the pauper still continuing ill, the surgeon applied to the overseers of the poor to know whether he should continue his attendances at their expense: the overseers answered, *they would give no authority, but if he brought in a reasonable bill they would see it paid*. The surgeon continued to attend the pauper, and then brought assumpsit against the overseers for his bill for attendances, &c. as a surgeon, upon a special promise by the defendants, as overseers of the poor, to pay for curing a pauper. It further appeared in evidence upon the trial, that the pauper was a servant in place at the time, and that the parish were in the habit of employing another surgeon for the ordinary poor. Lawrence, J., at the trial on the Oxford circuit, summed up in favour of the defendants, but the jury found a verdict for the plaintiff, and the Court, upon motion for a new trial, refused to disturb it.

collateral. And an application to him for payment(*n*), entering his name by the tradesman in his books as debtor(*o*), or making out the bill of parcels in the name of the person supplied(*p*), or in case of his becoming bankrupt, proving the value of the goods furnished as a debt under the commission(*q*), have been considered as giving credit to such person.

In many cases, the expressions made use of by the party giving the promise, at the time when the promise is given, are not to be exclusively relied upon in determining whether the promise is an original or a collateral promise, such expressions being in many instances equivocal (*r*)(9).

Where goods had been supplied by C. to B.,

(*n*) *Matson v. Wharam*, *supra*; in *Austen v. Baker*, 12 Mod. 250. and see *Rains v. Storry*, *supra*.

(*o*) *Jones v. Cooper*, Cowp. 227; *S. C. nom Jones v. Cowper*, Loft. 769; *Oldham v. Allen*, 2 Cr. & Mees. 433, cit.; *Matson v. Whorom*, 2 T. R. 80; *Anderson v. Hayman*, 1 H. Blk. 120; and see the observation of Holt, C. J.,

(*p*) *Langdale v. Parry*, 2 Dowl. & Ry. 337; and see *Barber v. Fox*, 1 Stark. 270.

(*q*) *Langdale v. Parry*, *supra*.

(*r*) *Oldham v. Allen*, 2 Cr. & Mees. 433, cit.; and see *Simpson v. Penton*, 2 Cr. & Mees. 430.

(9) In *Burkmire v. Darnell*, (Holt, 606,) it is said, "If two come to a shop, and one of them contracts for goods, and the seller does not care for trusting him, whereupon the other says, 'Let him have them, and I will undertake he shall pay you,' that is an undertaking for the debt and default of another, and within the act: but if the promise be, 'I will see you paid,' or, 'I will be your paymaster,' it is otherwise." And in *Watkins v. Perkins*, (1 Lord Raym. 224,) Lord Holt is reported to have said, "If A. promise B., being a surgeon, that if B. cure D. of a wound, he will see him paid, this is only a promise to pay if D. does not, and therefore it ought to be in writing by the Statute of Frauds; but if A. promise in such case, that he will be B.'s paymaster whatever he shall deserve, it is immediately the debt of A., and he is liable without writing."

These distinctions are now overruled, and, indeed, to allow the words spoken to be decisive of the nature of the undertaking, would in effect be, to let in the very perjury which it was the object of the statute to exclude. In giving judgment in *Simpson v. Penton*, (*supra*), Bayley, B., referred to a case, (*Oldham v. Allen*, *supra*), where there was a different construction upon the very same words, the *circumstances* making the promise in the one case an original, and in the other a collateral, undertaking.

at the request of A., an entry in C.'s books as follows—"Mr. B., *per* Mr. A.," was not considered sufficient to make the promise as against A. collateral, no credit having given to B. (s). And in another case (t), where C.'s foreman (C. being a tailor) had, in the absence of C. from home, sent certain wearing apparel (for which A. had promised to be liable) to B.'s house, but who, on C.'s return, prevailed upon B. to let him have them again, when they were again sent to B., at A.'s request, and upon another promise by him that he would pay for them, was held not sufficient to make A.'s promise a collateral one.

2ndly. The person undertaken for, or in whose favour the promise is given, having at one time been liable, he may, from the effect of the promise, cease to be so, in which case the promise is an original promise.

Although the general rule is, that a party who promises to pay the debt of another, is not liable unless that promise is reduced into writing, yet, if there is a new and distinct consideration, as the foundation or motive of the promise, as where the party who gives the promise derives a benefit or an advantage which he did not before possess, accruing to him immediately and directly by means, or in consequence of that promise; or, where the party receiving the promise relinquishes a benefit or an advantage which he had previous to receiving the undertaking, (the promise not being a mere naked promise to pay the original debt on the foot of the original contract,) a note in writing is not necessary, though the debt of another was the original cause of the undertaking; thus, if the goods of an insolvent tenant are about to be sold, and the landlord enters and distrains for the rent in

(s) *Simpson v. Penton*, 2 Cr. & Mees. 430.

(t) *Croft v. Smallwood*, 1 Esp. 121.

arrear(*u*), or having entered with an intent to distress(*v*), he is induced to give up the distress, or to refrain from distraining, in consequence of an undertaking given by a third party to pay the landlord such rent as should appear to be due to him from the tenant, the promise is not within the statute. And if the promise to pay the rent that is due, is unconditional and without qualification, and the landlord is induced to relinquish his right to the goods in consequence of that promise, it is immaterial whether the party promising has any beneficial interest in the matter, or is simply a trustee(*w*); or, if interested, that he does not derive the advantage which he expected when he gave the promise; as where the goods are, unknown to the party promising, subject to superior claims(*x*); or that the goods were of less value than the amount of the rent due(*y*); or that the promise was given by the party under a notion (which proved to be erroneous) that the tenant had been declared a bankrupt, and that the party giving the promise was his assignee(*z*). But the promise must not extend to that for which the goods were not answerable, as if the promise to the landlord is not only to pay him the rent that was due, but also the accruing and future rent; for as regards the latter, the landlord had no power of recovering it by distress, and the promise by such third person, would, as to such accruing and future rent, be a promise to answer for the debt of another within the meaning of the

(*u*) *Edwards v. Kelly*, 6 M. & Sel. 204; *Stephens v. Pell*, 2 Cr. & Mees. 710.

(*v*) *Williams v. Leper*, 3 Burr. 1886; *Bampton v. Paulin*, 4 Bing. 264.

(*w*) *Edwards v. Kelly*, 6 M. & Sel. 204.

(*x*) *Stephens v. Pell*, 2 Cr. & Mees. 710.

(*y*) *Gregory v. Williams*, 3 Meriv. 582; but see the observations of Lord Tenterden, C. J., in *Thomas v. Williams*, 10 B. & Cress. 664; and of Aston, J., in *Williams v. Leper*, 3 Burr. 1886; S. C. 2 Wils. 308.

(*z*) See *Pell v. Stephens*, 2 Myl. & K. 334.

statute(a). So where A. gives up to B. policies of insurance on which A. has a lien, to secure himself against bills, which on the faith of that lien he had accepted for the accommodation of the assured, and the person to whom he delivers them, promises to discharge the bills and give A. the same indemnity that his lien afforded him(b); or where the sheriff having taken goods in execution upon a *fieri facias*, a stranger promises to the officer to pay him the debt, in consideration that he would restore them(c); or where a tradesman having had goods delivered to him by their owner to repair, parts with those goods upon which he has a lien, on the promise of a third person to pay the demand(d); or where a defendant having been taken on a *capias ad satisfaciendum*, is discharged out of custody by consent of the plaintiff, on the promise of a third person to pay that debt; the debt of the original defendant being put an end to by his discharge(e); or where a person promises the widow of an intestate, that if she will permit his name to be joined with hers in the letters of administration of his assets, he will make good any deficiency of assets to pay the intestate's debts(f); or where A. sells goods to B., who being unable to pay for them, transfers them to C., and C., with the assent of A., promises A. to pay for them, whereby the debt of B. is extinguished(g);

(a) *Thomas v. Williams*, 10 B. & Cress. 664.

(b) *Castling v. Aubert*, 2 East, 325; *S. P. Barrell v. Trussell*, 4 Taunt. 117.

(c) *Love's Case*, 1 Salk. 28.

(d) See Lord Eldon's observations in *Houlditch v. Milne*, 3 Esp. 86.

(e) *Goodman v. Chace*, 1 B. & Ald. 297; and see *Atkinson v. Settree*, Willes, 482; and *Bird v. Gammon*, 3 Bing. N. C. 883.

(f) *Tomlinson v. Gill*, Ambl. 330.

(g) *Browning v. Stallard*, 5 Taunt. 450; and see *Roe v. Hough*, 1 Salk. 29; *Lacy v. M'Neile*, 4 Dowl. & Ry. 7; *Oble v. Dittlesfield*, 1 Vent. 153; *Wilson v. Coupland*, 5 B. & Ald. 228; *Israel v. Douglas*, 1 H. Blk. 239; *Hodgson v. Anderson*, 3 B. & Cress. 842; *S. C.* 5 Dowl. & Ry. 735; *Crowfoot v. Gurney*, 9 Bing. 372; and *Fairlie v. Denton*, 8 B. & Cress. 395; and the judgment of Buller, J., in *Tatlock v. Harris*, 3 T. R. 174.

or where A. being insolvent, an agreement is entered into between several of his creditors and B., whereby B. agrees to pay the creditors 10s. in the pound, in satisfaction of their debts, which they agree to accept, and to assign their debts to B. (*h*); or where an insolvent who was about to leave the country in fear of an arrest from one of his creditors, another creditor undertakes, that if the insolvent will execute to him an assignment of all his property, he will pay the debt of the creditor from whom he apprehends an arrest, in the first instance out of the proceeds, and apply the residue in satisfaction of his own demand, and the surplus, if any, to the insolvent (*i*); or where the plaintiff in an action having issued execution against A., A., without the assent of the plaintiff, conveys all his property to B., who thereupon undertakes to pay the plaintiff the debt due from A., the plaintiff withdrawing the execution (*k*); these have been held not to be within the statute.

CHAPTER III.

OF THE CONSTRUCTION OF COLLATERAL PROMISES.

AN instrument of suretyship is construed in the same manner as any other instrument is construed; namely, by having regard to the intention of the contracting parties, as it appears upon the instrument, *animus hominis est, anima scripti*; and which intention is to be sought out from the whole con-

(*h*) *Anstey v. Marden*, 1 N.R. 124.

(*k*) *Bird v. Gammon*, 3 Bing.

(*i*) *Gregory v. Williams*, 3 Meriv.
582.

N. C. 883.

text of the instrument taken together, *ex precedentibus et consequentibus optima expositio*(*l*); and when it is stated that a surety is not bound beyond the scope of his engagement(*m*), or the precise terms of his obligation(*n*), applying to it the strict letter of the law(*o*), it must be understood, that the contract clearly and plainly points out upon what condition, and to what extent, the surety intended to make himself liable(*p*); for if there is any ambiguity in the instrument itself, which cannot be explained by having recourse to the custom of the trade, in a case where the guarantee relates to a mercantile transaction(*q*), the words of it are to be taken as strongly against the party giving the instrument, as the sense of them will admit of(*r*)(1).

(*l*) *Barclay v. Lucas*, 1 T. R. 291 n.; *Dance v. Girdler*, 1 N. R. 34; *Kirkby v. Wright*, 2 Myl. & K. 131; *Metcalf v. Bruin*, 12 East, 400; *Strange v. Lee*, 3 East, 484; *Payler v. Homersham*, 4 M. & Sel. 423; *Irish Society v. Needham*, 1 T. R. 482; and see the judgment of the Court in *Drummond v. the Duke of Bolton*, Sayer, 243; and in *Parker v. Wise*, 6 M. & Sel. 239.

(*m*) *Dance v. Girdler*, *supra*; *Wright v. Russell*, 2 Blk. 934; S. C. 3 Wils. 530.

(*n*) *Glyn v. Hertell*, 8 Taunt. 208; S. C. 2 J. B. Moo. 134; *the*

Wardens of St. Saviour v. Bos-tock, 2 N. R. 175; *Pearsall v. Summerson*, 4 Taunt. 593; *Dance v. Girdler*, 1 N. R. 34.

(*o*) *Samuel v. Howarth*, 3 Meriv. 272; *Glyn v. Hertell*, *supra*; *Stratton v. Rastall*, 2 T. R. 366; *Bacon v. Chesney*, 1 Stark. 192.

(*p*) See *Solly v. Forbes*, 2 Brod. & B. 38.

(*q*) *Combe v. Woolf*, 8 Bing. 156; *Philips v. Astling*, 2 Taunt. 206.

(*r*) *Mason v. Pritchard*, 12 East, 227; *Hargreave v. Smea*, 6 Bing. 244; S. C. 3 Moo. & P. 573.

(1) A Judge of great eminence has delivered an opinion which seems to be at variance with the proposition above laid down. In *Nicholson v. Paget*, (1 Cr. and Mees. 48), a question arose whether a guarantee given to the plaintiff to be answerable for goods to be supplied to a person of the name of Lerigo, to the amount of 50*l.*, was a continuing guarantee, or was at an end after the plaintiff had once supplied goods to that amount: and Bayley, B., upon that occasion, said, "Now this is a contract of guarantee, which is a contract of a peculiar description, for it is not a contract which a party is entering into for the payment of his own debt, or on his own behalf, but it is a contract which he is entering into for a third person, and we

I. Of absolute guarantees, and propositions tending to guarantees.

The writing or undertaking may be either, 1st. An absolute guarantee; or, 2ndly. A proposition tending to a guarantee.

1st. When the writing or undertaking is an absolute guarantee, the person receiving such guarantee, may act upon it, without notifying his intention so to do, to the person giving such guarantee(s).

The following are examples of absolute guarantees:—

(s) See *Ozley v. Young*, 1 Esp. 424; *S. C.* 2 H. Blk. 613.

think that it is the duty of the *party who takes* such a security, to see that it is couched in such words, as that the party so giving it may distinctly understand to what extent he is binding himself. It is not unreasonable to expect from a party who is furnishing goods on the faith of a guarantee, that he will take the guarantee in terms which shall plainly and intelligibly point out to the party giving the guarantee, the extent to which he expects that the liability is to be carried." Opposed, however, to this *dictum*, is the opinion of Tindal, C. J., as reported in the case of *Hargreave v. Smee*, (6 Bing. 244,) where the judgment of the Court of Common Pleas was given upon a similar description of guarantee as that in *Nicholson v. Paget*, and his Lordship there says, "The question is, what is the fair import to be collected from the language used in this guarantee? *the words employed are the words of the defendant in this cause*, and there is no reason for putting on a guarantee a construction different from that which the Court puts on any other instrument. With regard to other instruments, the rule is, *that if the party executing them leaves any thing ambiguous in his expressions, such ambiguity must be taken most strongly against himself.*"

The rule as to the interpretation of instruments is thus stated in *Sheppard's Touchstone*, (p. 87.) "*Verba chartarum fortius accipiuntur contra proferentem, et quælibet concessio fortissime contra donatorem interpretanda est;*" and see also *Co. Litt.* 183 a; *Dann v. Spurrier*, 3 Bos. and P. 339; *Doe v. Dixon*, 9 East, 15; *Thorpe v. Thorpe*, 1 Lord Raym. 235; and the observations of Richardson and Hulton, Justices, in *Keble v. Halls*, *Litt.* 363, 370; and there seems to be no reason why a guarantee should not be subject to the same rule; it is, in almost all cases, upon the faith of the guarantee alone, that the person receiving it, is induced to give credit, or to supply goods to a third party; and the instrument ought therefore to be expounded (when doubtfully expressed) most to the advantage of him who receives it.

"I guarantee the payment of any goods which I. Stadt delivers to I. Nicholls"(t).

"I hereby agree to guarantee the payment of goods to be delivered in umbrellas and parasols to I. and E. A. Smee, according to the custom of their trading with you, in the sum of 200l."(u).

In the former case, the party giving the guarantee will be answerable for the value of all goods delivered to I. Nicholls, until the guarantee is revoked; in the latter case, for umbrellas and parasols delivered according to the custom of the trade, in any sum not exceeding 200l.

2ndly. If the writing or undertaking is simply a proposition tending to a guarantee, it must, in order to be converted into an absolute guarantee, receive the assent of the person to whom it is offered; and such assent (where an assent or acceptance of the proposal is all that is required) must be communicated to the person making the proposition (v), or some proof given, that the person making such proposition had subsequently consented to its being conclusive as a guarantee (w); and where the proposition is made subject to any terms or conditions, a strict compliance in every respect with the terms and conditions contained in such proposition, is necessary to make it binding (x).

(t) *Stadt v. Lill*, 9 East, 348;
S. C. nom *Stapp v. Lill*, 1 Camp.
242.

(u) *Hargreave v. Smee*, 6 Bing.
244; S. C. 3 Moo. & P. 573.

(v) *M'Iver v. Richardson*, 1 M.
& Sel. 557; *Symmons v. Want*,

2 Stark. 371; *Mozley v. Tinkler*,
1 Cr. M. & Ros. 692.

(w) *M'Iver v. Richardson*, *supra*.
(x) *Gaunt v. Hill*, 1 Stark. 10;
and see *Payne v. Ives*, 3 Dowl. &
Ry. 664, (2).

(2) In this case, the plaintiffs were coach lace manufacturers, and had shipped goods to India on account of a Mr. John Stubbs, upon the credit of the following guarantee, which had been signed by the defendants: "We undertake to indorse any bill or bills Mr. John Stubbs may give to Messrs. Payne & Co. in part payment of an order

The following are examples of propositions tending to guarantees.

“Messrs. M'Iver & Co.

“Gentlemen,

“As I understand Messrs. David Anderson & Co., of Quebec, have given you an order for rigging, &c., which will amount to about 4000*l.*, I can assure you, from what I know of D. A.'s honour and probity, you will be perfectly safe in crediting them to that amount; *indeed, I have no objection to guarantee you against any loss from giving them this credit*”(y).

“Sir,

“*I have no objection to guarantee the payment of rent, as far as that of each quarter, during Mr. T. Want's continuance in possession, but you must see that no arrears of rent accrue*”(z).

(y) *M'Iver v. Richardson*, 1 M. & Sel. 557.

(z) *Symmons v. Want*, 2 Stark. 371.

for lace, which is now being executed for him; Messrs. Payne & Co. to allow 5*l.* per cent. on the amount of the said bills for the said guarantee.” After the goods had been furnished, the plaintiffs drew a bill on Stubbs at eighteen months date, (the usual credit in the Indian trade,) which, after being accepted by Stubbs, the plaintiffs, for a period of 17 months and 10 days, retained without making any application to the defendants to indorse it; at the expiration of which time, Stubbs becoming insolvent, the plaintiffs, for the first time, required the defendant's indorsement to the bill, and tendered them the commission-money mentioned in the guarantee, but the defendants refused to accept the commission-money, or indorse the bill; and it was held, upon an action brought by the plaintiffs upon the guarantee, that they were concluded by their laches, and that the defendants were not liable; the legal construction of the instrument being, that the indorsement of the bill was to be the consideration for the commission, and that until the bill was indorsed no commission should be due; that as the instrument was signed by the defendants *only*, it was not binding upon the plaintiffs until accepted by them, and that the option given to the plaintiffs to make the agreement binding, ought to have been made in a reasonable time, at any rate before they knew of the insolvency of the acceptor.

It was held that each of the above writings was a mere overture to guarantee, and if it was meant to be accepted by the persons receiving it, notice of such intention should have been given to the defendant, or person making it.

“Doncaster, July 5, 1833.

“Gentlemen,

“Mr. France informs me that you are about publishing an Arithmetic for him and another person, and *I have no objection to being answerable as far as 50l. For any reference, apply to Messrs. Brooke & Co., of this place.*

“I am, Gentlemen,

“Your most obedient servant,

“Geo. Tinkler.

“Witness to Mr. Tinkler,

“J. Brooke”(a).

It was held that the defendant only intended to be bound by the instrument, in case, upon inquiry, the plaintiffs should be satisfied with regard to his solvency ; and that the plaintiffs ought to have communicated to the defendant that they were satisfied with his security, and not proving any notice of acceptance to the defendant, they were not entitled to recover (3).

(a) *Mozley v. Tinkler*, 1 Cr. M. & Ros. 692.

(3) At the trial it appeared that a person named France, being desirous of publishing a work on arithmetic, applied to the plaintiffs, who were printers and publishers, to publish the same. The plaintiffs did not reply directly to France, but addressed themselves to Brooke, a bookseller, through whose intervention the publication of the book by the plaintiffs was arranged, and the writing in question given. The memorandum was written by Brooke, and read over by him to the defendant, and the words at the foot of it, “Witness to Mr. Tinkler, J. Brooke,” were also in his handwriting. The writing having been forwarded to the plaintiffs through Brooke, the work was proceeded with, and the bill made out to France. It was contended, on behalf of the plaintiffs, that they appeared to be satisfied, because Brooke

“ Sir,

“ That it may not be said that I have made no effort to save my brother from prison, *I wish to know* if you will give him a full discharge, if I will pay one moiety of his debt. I have specified what I will pay, and no more. *If you will accept this, call upon me to-morrow morning*”(b).

The letter was not dated, but the post-mark upon it bore date the 28th of March. In order to show that the plaintiff had acceded to this offer, he read a letter sent by him to the defendant on the 4th of April, in which, after remonstrating with the defendant for not paying one moiety according to his offer, he says, “ I have taken an opinion on your letter, and am informed that I can recover upon it against you, therefore I shall not proceed against your brother.” It was held by Lord Ellenborough, C. J., at *Nisi Prius*, that the defendant’s letter was a mere proposition to pay a moiety, reserving a power to do any thing or nothing as he pleased the next day ; and that at all events it would be necessary to show that the plaintiff had on the next day acceded to the proposal in writing.

II. Of guarantees considered ; 1st. With reference to the amount for which the surety engages to be answerable ; 2ndly. With reference to the subject-matter in respect of which the surety makes himself liable ; 3rdly. With reference to the persons to whom, or the persons in whose favour they are given ; and, 4thly. With reference to their duration.

(b) *Gaunt v. Hill*, 1 Stark. 10.

was satisfied, of which the defendant was aware ; but the Court considered that Brooke acted merely in the character of referee, and communicated his opinion to the plaintiffs in order that the latter might form their own judgment upon the question ; and after they had done so, they ought to have communicated the result to the defendant.

1st. Of guarantees, with reference to the amount for which the surety engages to be answerable.

The sum, to which the surety has limited his responsibility, may either be expressly specified in the instrument itself, or be implied from the nature of it. If the instrument of suretyship is a bond with a penalty, the risk of the surety will, *in general*, be limited to the amount of the penalty(c), notwithstanding the obligation on the part of the surety is indefinite and unlimited(d); and where there are several sureties, and but one penalty, the sureties are together only liable to the amount of the penalty(e): upon this principle, if the sheriff take insufficient sureties in replevin, and the assignee of the replevin bond has incurred large expenses in suing the insufficient sureties, such assignee cannot recover against the sheriff as special damage, beyond the penalty of the replevin bond(f), unless he has given notice to the sheriff of his intention to sue the pledges; for had the sheriff received such notice, he might have prevented the expense of the action, by paying all he was liable to pay under the sureties' bond(g); but if the creditor holds any collateral security, as a mortgage, in addition to the bond, and the engagement on the part of the surety is to repay all debts which his principal shall contract, although the creditor, if he sues the surety upon the bond, is precluded from recovering any more than the pe-

(c) *Ex parte Rushforth*, 10 Ves. 409; *White v. Sealy*, 1 Doug. 49; *Wild v. Clarkson*, 6 T. R. 303; *Shepherd v. Beecher*, 2 P. Wms. 288; and see *Batcher v. Churchhill*, 14 Ves. 567; *Tew v. The Earl of Winterton*, 3 Bro. C. C. 489; *Knight v. M'Leon*, 3 Bro. C. C. 496.

(d) *Ex parte Rushforth*, *supra*.

(e) *Hefford v. Alger*, 1 Taunt. 218.

(f) *Baker v. Garratt*, 3 Bing. 56; *Evans v. Brander*, 2 H. Blk. 547; *Jeffery v. Bastard*, 4 Ad. & Ell. 823; *Paul v. Goodluck*, 2 Bing. N. C. 220.

(g) See *Baker v. Garratt*, *supra*.

nalty, yet if he resorts to the mortgage, the penalty is out of the question (*h*).

A guarantee to pay a bill of exchange, makes the party guaranteeing liable to pay interest, in the same manner as if he were party to the instrument (*i*); but an undertaking to pay a sum of money which has no direct reference to any bill, will not make the party guaranteeing liable to pay interest, though the money had been in the hands of the party giving the undertaking long before it was demanded: the loss of interest which the party entitled to the money had sustained, being held ascribable to his own neglect, in not pursuing his remedy as soon as he was able to do so (*j*).

2ndly. Of guarantees with reference to the subject-matter in respect of which the surety makes himself liable.

A party standing in the situation of surety, can only be liable on the precise terms of his legal obligation, and a court of equity will not carry his liability beyond that extent (*k*). If a person guarantee the payment of such gold as another person may supply to a working goldsmith for the purpose of his trade, and the person guaranteed discount bills of exchange for the goldsmith, and furnishes the amount of the bills partly in money *and partly in gold*, such a transaction is not within the terms of the guarantee, and the surety is not liable even for the amount of the gold so supplied, though it was supplied by the goldsmith in the way of his business (*l*). So where P., a builder, having contracted

(*h*) *Clarke v. Lord Abingdon*, 17 Ves. 106.

(*i*) *Slack v. Lowell*, 3 Taunt. 157.

(*j*) *Hare v. Rickards*, 7 Bing. 254.

(*k*) *Simpson v. Field*, 2 Ch. Ca. 22; *Ratcliffe v. Graves*, 1 Vern.

196; *S. C.* 1 Eq. Ca. Ab. 93; *Sheffield v. Lord Castleton*, 2 Vern. 393; *Rawstone v. Parr*, 3 Russ. 424. 539; *Samuell v. Howarth*, 3 Meriv. 272; *Hemming v. Trenery*, 2 Cr. M. & Ros. 385.

(*l*) *Evans v. Whyle*, 5 Bing. 485; *S. C.* 1 Mood. & M. 468.

to perform certain works, and requiring materials to complete the contract, applies to C. to supply him with such materials, which he agrees to do upon the guarantee of S. that payment of the price of the goods or materials so furnished by C. to P., shall be made *when the amount of the contract is paid*, and the contract fails through the neglect of P., so that the whole amount of the contract is not paid to P., C. is not entitled, as against the surety, to recover upon the guarantee; for the surety does not engage on his part that P. shall fulfil the contract, or that the money for the materials supplied by C. shall at all events be paid, but simply that the money payable to C. shall be paid, provided the full amount of the contract is paid; and as the full amount of the contract was not paid, C. is entitled to nothing from the surety (m). So where a guarantee is given to be answerable for a supply of money to the extent of a certain sum, for the use of a named house of trade, and the house of trade is, at the time the guarantee is given, under liabilities to the persons guaranteed, to secure which the latter hold bills of exchange bearing the acceptances of such house, and which upon the receipt of the guarantee they deliver up to the house of trade, and take new notes from the house; such interchange of existing notes is not a *loan of money* within the terms of the guarantee, which is prospective in its operation, and contemplates only an advance of money, leaving the past transactions as they were (n). So where the defendant agreed to guarantee the plaintiff against any loss in case the defendant's son should become bankrupt, and the plaintiff alleged in his declaration that the defendant's son had become bankrupt; it was held that

(m) *Hemming v. Trenery*, 2 Cr. M. & Ros. 385.

(n) *Glyn v. Hertel*, 8 Taunt. 208; S. C. 2 J. B. Moo. 134.

the plaintiff was bound to show that a commission of bankrupt had been sued out, and evidence that the son was a trader, and that he had been lying in prison more than two months, and that the plaintiff was ready to prove a debt upon which a petition for a commission of bankrupt might have been founded, was held insufficient; for it was possible that the son might have been unfortunate enough to commit an act of bankruptcy, although perfectly solvent, and it could not be the meaning of the guarantee to make the father responsible in such a case, if no commission had been sued out (*o*). So where a bond is given for the due accounting by a collector of taxes, to be received by virtue of an act of Parliament, the surety will not be answerable for the monies received by the collector, unless the collector be legally appointed under the act, and is authorized to receive such duties under it, although it may have happened that the collector has received sums from the subjects as and for such duties (*p*); but where a person who was appointed under an act of Parliament to collect certain rates and duties, but which act gave no power to collect the rates in question, but only enacted that the rates and duties should be collected under the regulations of any act *to be* passed in the same session of Parliament relating to such duties, and the act referred to passed in the prior part of the sessions; it was held that the act duly authorized the collection of the duties—that the words “any act to be passed in the present session” must be taken with reference to the commencement of the session, which is a thing of continuity, embracing both the past and the future portions of it (*q*).

Agreeably to the rule in the construction of an

(*o*) *Bulkeley v. Lord*, 2 Stark. East, 511.
406.

(*q*) *Nares v. Rowles*, *supra*.

(*p*) See *Nares v. Rowles*, 14

instrument, that regard should be had, and effect, if possible, be given to every part of it (*r*), it is established that if the instrument of suretyship is a bond, the condition of the bond shall be construed with reference to the recital, which is a proper key to its meaning (*s*), and where the words of the obligation import a larger liability than the recital contemplates, those words will be restrained by the particular recital (*t*) (12); thus, where the condition of a bond, after reciting that a sheriff had appointed one J. S. bailiff of a hundred within his county, was for the duly executing by J. S. of *all warrants* to him directed; it was held that the words "all warrants" shall be intended only all warrants which shall be directed to J. S., as bailiff of the said hun-

(*r*) See *ante*, p. 26.

(*s*) *Hassell v. Long*, 2 M. & Sel. 363; *Peppin v. Cooper*, 2 B. & Ald. 431; *Sansom v. Bell*, 2 Camp. 39; *African Company v. Mason*, 1 Stra. 227, *cit*.

(*t*) *Payler v. Homersham*, 4 M.

& Sel. 423; *Peppin v. Cooper*, *supra*; and see *Simons v. Johnson*, 3 B. & Ald. 175; *Thorpe v. Thorpe*, 1 Lord Raym. 235; *Lampon v. Corke*, 5 B. & Ald. 606; *Knight v. Cole*, 3 Lev. 273; S. C. 3 Mod. 277; S. C. 1 Show. 150.

(12) But where a bond was executed by a person of the name of Swift and two other persons as his sureties, in the penalty of 1,000*l.*, the condition of which, after reciting that the defendant Swift had taken a farm of the plaintiff for the term of fifteen years, subject to the payment of the yearly rent of 450*l.*, and to the provisoes, conditions, covenants, and agreements contained in an indenture of lease; and that it had been agreed by and between the defendant Swift and John Ingleby, the plaintiff, that the defendant Swift should enter into a bond or obligation in writing, with two sufficient sureties in the penalty of 500*l.*, for the payment of the rent, and the true observance and performance of the covenants, &c. in the said in part recited indenture of lease contained, was declared to be, that if the defendant Swift, his executors, &c., should pay the said yearly rent at the days and times expressed in the said indenture of lease, and observe the covenants, &c., then the said bond should be void; but otherwise should remain in full force and virtue: the Court of Common Pleas refused to cut down the penalty of 1,000*l.* to 500*l.* by the recital of the agreement to execute another bond in another penalty, it being obvious that the intention of the obligee in taking the bond was to secure the payment of the rent, and the performance of the covenants in the indenture referred to, and held that the condition was not satisfied by payment of rent to the amount of 500*l.*, when more was in arrear. (*Ingleby v. Swift*, 10 Bing. 84.)

dred, and no other warrants (u). Nor will the condition of a bond, after reciting the appointment of a person as collector of certain duties imposed under an existing act of Parliament, extend to duties which are subsequently imposed (v). But if *any new subject-matter* is introduced into the condition of the bond, an extended liability is created, and the surety's responsibility will not be confined to the limits specified in the recital; as where the condition of a bond, after reciting that the obligees had agreed to accept bills of exchange to be drawn upon them by one P., to the amount of 10,000*l.*, was for the payment to the obligees of *all sums of money* as the said P. might stand indebted to the obligees by reason of their being so under acceptances for the said P., *or on any other account thereafter to subsist between them, the said P., and the obligees*, when and as the same should become due and payable (w).

Again, where the condition of a bond, after reciting the appointment of a person to the office of overseer, was for the overseer's faithfully accounting for all sums received by him *by virtue of his office of overseer*; the obligation of the surety does not extend to monies borrowed by the overseer without the direction of the parishioners, though the monies so borrowed are applied by him to parochial purposes; for the borrowing of money is no part of the duty of an overseer, and therefore could not have been received by him by virtue of his office (x). Where, however, the condition of a bond, after reciting that the vendor was seised in tail of an estate, of which he had covenanted to suffer a recovery at a future day, to the use of the purchaser

(u) *Stoughton v. Day*, Sty. 18, *the Attorney-General, Parker*, 277. S. C. Al. 10.

(w) *Sansom v. Bell*, 2 Camp. 39.

(v) *Bowdage v. the Attorney-General, Parker*, 278; *Bartlett v.*

(x) *Leigh v. Taylor*, 7 B. & Cress. 491.

in fee, was, that the bond should be void if the recovery should be suffered, *so as and in such manner as that under and by virtue thereof the estate should be vested in the purchaser for ever*, and the recovery was duly suffered, but the vendor being seised for life only, the purchaser brought an action on the bond, to which the surety pleaded, that if the vendor had been seised in tail, the recovery was suffered so as to vest the estate in the purchaser in fee: it was held that the plea was bad, because the recital in the condition did not estop the purchaser from disputing that the vendor was seised in tail, nor release the surety from his obligation, it being the intention of the parties, not that the vendor should go through the mere form of suffering a recovery, but that the purchaser should have an estate in fee: the condition amounting to a warranty of title, as much as if the parties had covenanted that the vendor was seised of an estate tail (y). So where the condition of a bond, after reciting that one J. S., who had a wife and several infant children, had taken a lease of a house belonging to the parish for a term of seven years, was for indemnifying the parish against any charges which it might sustain on account of J. S. and his family becoming inhabitants of and belonging to the parish, is not limited to the period of seven years for which the lease was granted, or discharged by J. S.'s purchasing an estate of the value of 30*l.* in the parish, and residing on it upwards of forty days after the expiration of the seven years; for the intention of the parties to the indemnity was, to secure the parish from the consequences which might result from his becoming an inhabitant of the parish; one of which consequences was, J. S.'s

(y) *Edwards v. Brown*, 3 You. & J. 423.

becoming, in case of his poverty, chargeable to the parish, and that having acquired a settlement during the seven years, J. S. could not gain a second settlement on account of his having subsequently purchased and resided on an estate in the parish which might have conferred on him a settlement there, if he had not gained one before (z).

It seems doubtful whether a guarantee for the payment of goods, which are supplied to the principal, will extend to the vessels in which those goods are contained. At all events it seems that if the vessels can be considered as accessory, they must be the identical vessels, and not others furnished on a different occasion. In *Combe and others v. Woolf* (a), the plaintiffs brought an action against the defendant upon his guarantee to see the plaintiffs paid for *any porter* they might send to a Mr. Abraham Joseph. In addition to the plaintiff's claim for porter furnished by them to the principal debtor, the plaintiffs claimed 17l. 5s. for casks not returned. The Court seemed to be divided in opinion upon the question, whether the plaintiffs could, upon a guarantee which mentioned porter *only*, recover the price of the casks in which that porter had been contained, supposing the casks were the identical casks which contained the porter in respect of which the action was brought; but it appeared that these casks, though furnished subsequently to the defendant's guarantee, were not the identical casks which had contained the porter in respect of which the action was brought; independently of which, there was no count in the plaintiff's declaration which applied to them.

The engagement of the surety may be confined

(z) *Edwards v. Bobbitt*, 1 M. & Sel. 120.

(a) 8 Bing. 156.

to a particular dealing or transaction (*b*) ; or it may extend to a series of dealings and transactions successively renewed (*c*). If a single dealing or transaction only is contemplated, the guarantee is extinguished as soon as the contemplated dealing or transaction has been completed, and satisfaction made by the principal ; in the other case, the guarantee continues in force until (in a general case) it is determined by notice. This description of guarantee is usually called a *continuing* or *standing* guarantee.

The distinctions between the cases on this subject are very nice (*d*) ; it seems, however, that if the surety engages to be answerable for *any* goods supplied to the principal (*e*), or for *any* debts the principal may contract (*f*) to a specified amount, such a guarantee will not be considered as confined to the first transaction, but applies to debts which the person undertaken for may from time to time contract ; so that where a debt has been incurred by the principal to the amount at which the surety fixed his liability, which the principal afterwards discharges, the liability of the surety upon his undertaking still continues. So if the expressions of the instrument refer to a *course of dealing* as having subsisted between the creditor and the prin-

(*b*) *Kirby v. The Duke of Marlborough*, 2 M. & Sel. 18 ; *Kay v. Groves*, 3 Moo. & P. 634 ; *S. C.* 6 Bing. 276 ; *S. C.* 4 Car. & P. 72 ; *Nicholson v. Paget*, 1 Cr. & Mees. 48 ; *Melville v. Hayden*, 3 B. & Ald. 593 ; *Walker v. Hardman*, 11 Bli. N. S. 229 ; *Bovill v. Turner*, 2 Chit. 205.

(*c*) *Bastow v. Bennett*, 3 Camp. 220 ; *Mason v. Pritchard*, 2 Camp. 437 ; *S. C.* 12 East, 227 ; *Merle v. Wells*, 2 Camp. 413 ; *Har-*

greave v. Smee, 6 Bing. 244 ; *S. C.* 3 Moo. & P. 573 ; *Allan v. Kenning*, 9 Bing. 618.

(*d*) *Per Bayley, B.*, in *Nicholson v. Paget*, 1 Cr. & Mees. 48 ; and see the observations of Tindal, C. J., in *Hargreave v. Smee*, 6 Bing. 244.

(*e*) *Bastow v. Bennett*, 3 Camp. 220 ; *Mason v. Pritchard*, 2 Camp. 437, *S. C.* 12 East, 227.

(*f*) *Merle v. Wells*, 2 Camp. 413.

principal (*g*), it will be inferred, it was the intention of the parties that the dealings should be continued until further notice, and the guarantee will be considered as a continuing guarantee; as, for example, where the guarantee was expressed to be for the payment of goods delivered to the principal, *according to the custom of the principal's trading with the creditor* (*h*); and *à fortiori*, if the guarantee expressly points to a continuance of such dealings (*i*).

A bond in the common form, with a penalty, conditioned to secure the payment of a sum of money, with interest from the day of the execution of the bond, payable at a day named (*j*), or upon demand (*k*), given to bankers by their customers, and a third person as their surety, will, *as regards the surety*, be considered as a security for the debt then actually due from the customers to the bankers, and not as a security for any floating balance, or contingent debt, which may at any time be due to the bankers, notwithstanding there was a collateral agreement between the bankers and their customers that the bond had been deposited with the bankers as a security for such floating balance, provided there is no evidence to connect the surety with such collateral agreement (13).

Where the condition of a bond, after reciting that the principal had occasion for divers sums of money not exceeding in the whole the sum of

(*g*) *Hargreave v. Smee*, 6 Bing. 244; *S. C.* 3 Moo. & P. 573; *Allan v. Kenning*, 9 Bing. 618.

(*h*) *Hargreave v. Smee*, 6 Bing. 244; *S. C.* 3 Moo. & P. 573

(*i*) *Allan v. Kenning*, 9 Bing. 618.

(*j*) *Walker v. Hardman*, 11 Bli. N. S. 229.

(*k*) *Walker v. Hardman*, *supra*.

(13) A warrant of attorney with a defeazance, stating it to be given as a security for 4,000*l.*, and interest thereon, has been held to be (as between the debtor and creditor) a continuing security, and not merely a security for money then due. (*Woolley v. Jennings*, 5 B. & Cress. 165; *S. C.* 7. Dowl. & Ry. 124; *S. C.* 2 Car. & P. 144.)

3,000*l.*, and had applied to the obligees to advance the same at such times and in such parts and proportions as he (the principal) might require, was, to indemnify the obligees for the payment of all such sums not exceeding 3,000*l.*, which should *at any time thereafter* be advanced by the obligees to the principal, was held a guarantee to a definite amount, namely, 3,000*l.*, and when an advance was made to that amount, the guarantee became *functus officio*, and was not a continuing guarantee(*l*). So where the condition of a bond, after reciting that at the request and for the accommodation of P., the plaintiff had accepted, drawn or indorsed, negotiated and paid sundry bills of exchange, several of which were still outstanding and unpaid, and in order to indemnify and save him harmless in respect thereof, and from all losses, costs, charges, damages, and expenses, the defendant had consented to join with P. in manner thereafter mentioned, was, that if P., his heirs, &c. should at all times thereafter pay to the plaintiff, upon demand, all such money as the plaintiff already had, or as *at any time or times thereafter* he should or might advance, expend, or pay, to or for the use, or on account of P., and also all such money as the plaintiff then was, or at any time thereafter should, or might become, or be subject or liable to pay, by virtue or upon account of his having accepted and engaged himself for the payment of any bills of exchange, promissory notes, or drafts, at the request, or for the use, or on account of P., then the obligation should be void; was held to be an indemnity only in respect of those transactions between the plaintiff and P., for which the plaintiff had made himself liable previous to the giving of the bond(*m*).

(*l*) *Kirby v. the Duke of Marlborough*, 2 M. & Sel. 18.

(*m*) *Pearsall v. Summersett*, 4 Taunt. 593.

And the following guarantees have been held to be limited to a single supply of goods, and not to be continuing or standing guarantees :—

“ I hereby agree to be answerable to Mr. Kay for the amount of five sacks of flour, to be delivered to Mr. W. Taylor, payable in one month” (n).

“ I hereby agree to be answerable for the payment of 50*l.*, for T. Lerigo, in case T. Lerigo does not pay for the gin, &c., which he receives from you, and I will pay the amount” (o).

“ I engage to guarantee the payment of Mr. Amos Macelden, to the extent of 60*l.*, at quarterly ac-

(n) *Kay v. Groves*, 3 Moo. & P. 634, S. C. 6 Bing. 276, S. C. 4 Car. & P. 72, (14). (o) *Nicholson v. Paget*, 1 Cr. & Mees. 48.

(14) In this case, assumpsit was brought against the defendant upon the above guarantee, which bore date the 18th of November, 1828. At the trial it was proved that on the 19th of November, 1828, the plaintiff delivered to Taylor five sacks of flour. On the 24th, Taylor sent back three and a half sacks out of the first five, as being of bad quality, and three and a half other sacks were supplied that day. For the first parcel Taylor gave a return ticket to the plaintiff's carman as follows :—

“ Received from Mr. Kay,
On account of Mr. Groves, (the surety) five sacks of whites.

“ W. Taylor.”

The return ticket given for the second parcel was :—

“ Received from Symons' Wharf, five sacks flour balls, on account of Mr. Kay.

“ W. Taylor.”

The defendant paid into court 3*l.* 17*s.*, the price of a sack and a half of flour. C. J. Tindal, before whom the cause was tried, observing that the plaintiff had proved no second order from the defendant, nor any agreement on his part that three and a half sacks should be substituted on the 24th of November, for three and a half sacks delivered on the 19th, and to be paid for within a month from that day, left it to the jury to determine whether the delivery on the 24th was made under the defendant's guarantee, and in substitution of any part of the delivery on the 19th, or whether it was made under a new contract. The jury having found for the defendant, a rule *nisi* for a new trial was obtained by the plaintiff's counsel on the ground that the guarantee was a continuing guarantee, at least to the extent of five sacks, and that the jury should have been directed to find for the plaintiff to that extent, but which rule the Court of Common Pleas afterwards, upon argument, discharged.

count, bills two months, for goods to be purchased by him of W. and D. Melville" (p).

"You may let Larry have coals to 50*l.*, for which I will be answerable at any time" (q).

Where a debtor gave his creditor a *cognovit* for the payment of his debt by instalments, with a proviso, that on default made in paying any instalment, judgment might be signed and execution issue for the whole debt, and a third person undertook that within a certain time after any notice given to him for that purpose, the debtor should attend at a certain place, so that in case of any of the instalments not being previously discharged, a *capias ad satisfaciendum* to be issued on the judgment to be entered up on the *cognovit*, might be duly executed, and in default of the debtor's appearing at the time and place stipulated, the surety undertook to pay the debt and costs, and the first instalment being unpaid and notice given, the debtor appeared at the proper time and place, but was dismissed on promising to pay the instalment in a few days, which he did: it was held that the object of the agreement was, that upon any default made, the creditor should have execution, and should have it without trouble by means of the surety's undertaking, and that the agreement of the surety was satisfied by his having once rendered the debtor to be taken in execution on the *cognovit*, and that he was not bound to produce him again upon notice, upon default as to a subsequent instalment (r).

3rdly. Of guarantees with reference to the persons to whom, or the persons in whose favour, they are given.

In the construction of instruments entered into by

(p) *Melville v. Hayden*, 3 B. & Ald. 593.

(q) *Bovill v. Turner*, 2 Chit. 205.

(r) *Turner v. Pyne*, 1 Ad. & Ell. 34.

a surety with persons carrying on business together in co-partnership, the object of which instruments is, to answer for the fidelity of persons during the time they are in the service of the partners, or to secure the repayment of advances made by the partners to the persons undertaken for, in the course of their dealings, it has been held, that where an engagement is entered into by a surety with the partners' *nomination*, whereby the surety engages to be answerable for the repayment of all sums which shall be advanced by them to the principal, it will not extend to sums advanced to the principal by the surviving or continuing partners, after the decease(s), or retirement(t), of any of the partners; for it is probable that the surety was induced to enter into such a security by a confidence which he reposed in the integrity, caution and accuracy, of one or two of the partners, and it may be that the partner dying or going out, may be the very person on whom the surety relied; or that the surety intended to have the joint discretion of all the partners to direct and moderate their advances, and would not have relied on the discretion with which the surviving or continuing partners might authorize advances to the principal, and it would therefore be very unreasonable to hold the surety to his contract, after such change.

The same law applies to a case where the parties undertaken for, carry on business in co-partnership, and one of them dies or retires(u); for the motive which induced the surety to give his security, may have been the opinion entertained by him as to the integrity and prudence of the deceased or retiring partner; or where the partners with whom the ori-

(s) *Weston v. Barton*, 4 Taunt. 673; *Strange v. Lee*, 3 East, 484.

ex parte Marsh, 2 Rose, 239.

(u) *Simson v. Cooke*, 1 Bing.

(t) *Myers v. Edge*, 7 T. R. 254; 452; S. C. 8 J. B. Moo. 588.

ginal contract was entered into, introduced a new partner into their firm(*v*); for the surety might have been disposed to withhold the security, had he known at the time when he entered into that contract, that the advances were to be made to the party for whom he is surety, by the person then admitted into the firm; or where the person undertaken for was, at the time the undertaking was given, a sole trader, and he afterwards takes a person as a partner(*w*); for the surety became responsible for the acts of his principal, and not for those of any future partner with whom he might associate.

And the surety's liability ceases upon the death or retirement of a partner in the firm to whom the guarantee is given, in a case where the engagement on the part of the surety is to be answerable for the repayment of monies advanced to the principal, by persons carrying on business together as partners, *or any or either of them*(*x*); or where the persons undertaken for are partners, and the surety's engagement is to secure the repayment of monies advanced to the principals, *or any or either of them*(*y*), the words "or any or either of them" being confined in their meaning to monies advanced by, or to, any or either of them during the co-partnerships respectively. So where the condition of a bond, after reciting that the obligee had taken and employed one P. as his book-keeper and accountant, was, that he should account for and pay to the obligee, *his executors or administrators*, all sums of money received by the said P. on account of the obligee, his executors, or administrators, and the executors of the obligee having carried on their

(*v*) *Wright v. Russell*, 2 Blk. 934; S. C. 3 Wils. 530; *Spiers v. Houston*, 4 Bli. N. S. 515.

(*x*) *Weston v. Barton*, 4 Taunt. 673.

(*w*) *Bellairs v. Ebsworth*, 3 Camp. 53.

(*y*) *Simson v. Cooke*, 1 Bing. 452; S. C. 8 J. B. Moo. 588.

testator's trade after the obligee's death, and retained P. in the same employment, it was held that the surety for P. was not answerable for monies received by P. during the time he was in the service of the executors,—that the service in the contemplation of the parties was the service of the obligee, and that there was no intention that the bond should be extended beyond the life of the obligee, and that though P. was to account to the executors, it was only for money belonging to the obligee(z).

The obligation of the surety may, however, be so shaped as to extend to the surviving partners, they carrying on the concern upon the death of one of them(a); or to the introduction of other persons into the firm(b), and this may be done upon the construction of a letter raising an agreement to that effect, where the original instrument is insufficient for such a purpose(c); but an undertaking to be answerable to *the partners and the survivors or survivor of them, or the executors or administrators of such survivor*, will not extend to a new partnership(d), although the difference in the two partnerships consists only in the introduction of the executor of a deceased partner in the place of his testator, to the latter of whom power had been given by the articles under which the original partnership was formed, and before the indemnity was given, to bequeath his share of the concern in favour of his wife and children, and who had accordingly bequeathed it to his executor, in trust for such wife and children(e).

If, however, the security is given to the *house*, as a banking-house or house of trade, and not to the

(z) *Barker v. Parker*, 1 T. R. 287.

(a) See *Simson v. Cooke*, 1 Bing. 452.

(b) See *Simson v. Cooke*, *supra*; *Augero v. Keen*, 1 Mees. & W. 390;

Pease v. Hirst, 10 B. & Cress. 122.

(c) *Ex parte Marsh*, 2 Rose, 239.

(d) *Pemberton v. Oakes*, 4 Russ. 154.

(e) *Pemberton v. Oakes*, *supra*.

particular individuals who compose it, as a guarantee for the fidelity of a person who is taken into the service of the persons to whom the indemnity is given, *as a clerk in their shop or counting-house*(f); or where the security is given to a *company*, which necessarily means a fluctuating or successive body of persons, who should from time to time be carrying on the business which the company professed to carry on, as a guarantee for the good conduct of a person *whilst in the service of the said company*(g), a change among the members of which the company is composed in the one case, or a change of partners in the house of trade in the other, will not put an end to the indemnity. So where the condition of a bond, after reciting that A. and B. had filed a bill in equity against C. and D., was, that the surety obligor should pay all such costs as the Court should award to the *defendants* on the hearing of the cause, and D. having died before any costs had been awarded, it was held (Abbott, C. J., *dubitante*), that the death of D. could not be pleaded in discharge of the bond, for the bond not being conditioned to pay such costs as the Court of Equity

(f) *Barclay v. Lucas*, 1 T. R. 291 n. (1).

(g) *Metcalf v. Bruin*, 12 East, 400; S. C. 2 Camp. 422.

(1) The propriety of the decision in *Barclay v. Lucas* has been questioned. (See the observations of Lord Ellenborough in *Strange v. Lee*, 3 East, 484, and of Sir James Mansfield in *Weston v. Barton*, 4 Taunt. 673.) It is not disputed, that if it can be collected that the parties intended that the guarantee should be an available security for the benefit of the *house*, and not for the *particular existing partnership*, a change in the partners of that house will not have the effect of putting an end to the guarantee so long as the house or firm is substantially the same establishment, and continues to carry on their accustomed business: but it is to be observed, that in *Barclay v. Lucas* the guarantee was given to the partners *individually*, and not to the house or firm carrying on business under the style which the house was accustomed to assume; and in this respect the case seems not to differ from those cases in which it has been held, that a change in the partners of a firm puts an end to the security.

should award to C. and D. *by name*, but to pay such costs as should be awarded by that Court to the *defendants*; the meaning of the parties was, that the surety obligor should pay all such costs as should be awarded by the Court *to those who at that time filled the character of the defendants in equity (h)*. But an indemnity given to *certain persons and their successors*, as the governors of a voluntary unincorporated society, ceases upon the society's becoming incorporated (*i*); for in the judgment of the law, the society is, after the charter of incorporation, a perfectly new body of persons, the individual members being liable for debt in the one case, and only the corporation funds in the other; and it is reasonable to suppose that a surety may be willing to give his security when the governors were personally responsible, and therefore the more likely to look after the conduct of the person in their service, although his fidelity had been guaranteed, than they would do if they were not responsible.

4thly. Of guarantees with reference to their duration.

Upon the principle, that a bond is construed with reference to the recitals (*j*), it has been held, that where the condition of a bond, after reciting that the plaintiff had appointed one P. to be his deputy-postmaster for six months, was, that P. should faithfully account during all the time he should continue deputy-postmaster; the liability of the surety was confined to the period of six months mentioned in the recital, though the employment of P. continued for a longer period (*k*). So if a bond, after reciting the appointment of a person to an office,

(h) *Kipling v. Turner*, 5 B. & Ald. 261.

(i) *Dance v. Girdler*, 1 N. R. 34.

(j) See *supra*, p. 37.

(k) *Lord Arlington v. Merricke*, 2 Saund. 411; *S.P. Liverpool Waterworks v. Atkinson*, 6 East, 507.

the duration of which is limited to a particular period, either *expressly* by an act of Parliament (*l*), or *impliedly* from the nature of the office itself, (as, for example, where the appointment is made by one, in virtue of an office which is itself limited, in which case the offices will be considered as co-existent (*m*),) and the bond is conditioned for the due collection, by the person appointed to such office, of all monies received by him by virtue of such office, *at all times thereafter*, a due collection for the particular period, is a compliance with the condition, notwithstanding the words of the condition are general and indefinite as to time, and would of themselves extend the liability of the surety beyond the particular period. And the liability of the surety in a bond given to the obligees, or *their successors*, conditioned for the faithful accounting by an officer appointed by the obligees, in virtue of their office, (such office being limited to a particular period,) has been held not to extend beyond the time during which the obligees were in office; the word "successors" having been considered to have been introduced in ease of the collector, that he might discharge himself by immediate payment to those who would ultimately have the disposition of the money, and not to indicate any intention that the collector should continue to act after the obligees' successors came into office (*n*). But if the office which the person has been appointed to fill, and for the faithful discharge of the duties of which, the surety has engaged to be answerable, is not limited in its duration (*o*), or being limited in its duration, it clearly appears from the condition, that the parties meant to provide for

(*l*) *Peppin v. Cooper*, 2 B. & Ald. 431.

(*m*) *Hassell v. Long*, 2 M. & Sel. 363; *the Wardens of St. Saviour v. Bostock*, 2 N. R. 175; *Leadley v. Evans*, 2 Bing. 32; S. C. 9 J. B.

Moo. 102.

(*n*) *Leadley v. Evans*, 2 Bing. 32; S. C. 9 J. B. Moo. 102.

(*o*) *Curling v. Chalklen*, 3 M. & Sel. 503.

the continuance of the party in office, and for the responsibility of the surety upon a re-appointment of the same individual (*p*), the obligation of the surety will, notwithstanding the obligees themselves are annual officers, if given to them and *their successors* (*q*), continue in force, after the obligees to whom the bond is given, have gone out of office.

Although it may be stated generally, that it is in the power of the surety to determine his liability, by recalling his credit where no liability has attached, the instrument may be so framed as to make the security not dependant upon the surety for its determination, but dependant either upon the person to whom, or the person for whose use it was given (*r*); thus, if C. agrees to take P. into his service as a collecting clerk, (but not for any definite period,) and P., together with S. as his surety, execute a joint and several bond to C., in a penal sum, conditioned to be void if P. shall, during his continuance in the service of C., duly account for all his receipts, it is not in the power of S. to say at any particular time that he will no longer be liable to C. on P.'s behalf, but the liability of S. continues so long as P. remains in the service of C. (*s*). So if a person become surety for a receiver in a suit in equity, he will be held bound to his recognizance, and will not, while the suit continues, be discharged at his request, if it be not for the benefit of the parties interested in the subject-matter of the suit that the surety should be discharged (*t*): unless the surety can show that underhand practices have taken place between the receiver and the parties on whose behalf

(*p*) *Augero v. Keen*, 1 Mees. & W. 390.

(*q*) *M'Gahey v. Alston*, 1 Mees. & W. 386; *Augero v. Keen*, *supra*.

(*r*) *Gordon v. Calvert*, 3 Man. & Ry. 124; S. C. 7 B. & Cress. 809; S. C. 2 Sim. 253; S. C. 4 Russ.

581; *Griffith v. Griffith*, 2 Ves. 400; *Shepherd v. Beecher*, 2 P. Wms. 288.

(*s*) *Gordon v. Calvert*, *supra*.

(*t*) *Griffith v. Griffith*, 2 Ves. 400.

he was appointed (*u*). So a surety who has given bond in a writ of *ne exeat regno*, sued out by the plaintiff in a suit, conditioned for the principal's not departing the kingdom, will not be discharged, though the principal's answer has been put in (*v*); or where the bill has been subsequently amended under a common order, if the amendments do not vary the substance of the plaintiff's case (*w*); or even where the principal is in custody for want of an answer (*x*) (2). But if after a decree has been pronounced against the principal for the same matter for which the writ of *ne exeat regno* issued, the defendant be in custody for not performing the decree, the surety may then apply for and obtain an order that he be discharged, and the bond will as to him be cancelled (*y*). So if a father places his son an apprentice with a merchant for seven years, and give a bond for his son's fidelity, the father cannot discharge himself from his liability, without the consent of the merchant, until the seven years have expired (*z*).

(*u*) *Hamilton v. Brewster*, 1 *ex. reg.* in n.; S. C. 19 Ves. 615; Moll. 28, in n. *Le Clea v. Trot*, *supra*; *Archbold*

(*v*) *Le Clea v. Trot*, Pre. Ch. v. *Burrell*, Toth. 17, *contrà*.
230. (*y*) *Debazin v. Debazin*, 1 Dick.

(*w*) *Grant v. Grant*, 5 Russ. 95.

189. (*z*) *Shepherd v. Beecher*, 2 P.

(*x*) *Stapylton v. Peile*, Bea. ne Wms. 288.

(2) At common law, bail are discharged upon the rendering of their principal. In *Westley v. Brown*, (1 Bulstr. 43,) it is stated, that the principal being in custody of the marshal's man, the creditor, with the view to charge the bail with the debt, desired the marshal's man (as the report expresses it) to let the principal *ire ad largum*, which he accordingly did, and it was held the bail were discharged, the creditor not having any remedy against the bail when he hath once taken the principal in execution; equity, however, following the civil law, (see Inst. lib. IV. tit. XI. § 2,) will not relieve the surety in a case of *ne exeat regno* until judgment is pronounced.

CHAPTER IV.

OF THE REQUISITES TO SUPPORT A COLLATERAL PROMISE.

THE Statute of Frauds (*a*) requires, in order to make a collateral promise binding—

1st. That the agreement for the promise, or some memorandum or note thereof, be in writing; and, 2ndly. That it be signed by the party to be charged, or his agent lawfully authorized. Subsequent cases have determined that the consideration (which must be a sufficient consideration) must appear upon the face of the agreement.

It is proposed to consider, although not in the order above-mentioned, I. What is deemed a sufficient consideration to support a collateral promise. II. What is a sufficient statement of the consideration in writing. III. What is a sufficient memorandum, or note of the agreement. IV. What is a sufficient signing by the party, or his agent. And, V. Who will be deemed an agent lawfully authorized.

I. What is deemed a sufficient consideration to support a collateral promise.

The law requires that every contract (the same not being under seal) shall be made upon a good and sufficient consideration (*b*), and the mere promise by one person to be answerable for the debt, default, or miscarriage of another, without any con-

(*a*) See *ante*, p. 2.

(*b*) *Rann v. Hughes*, 7 T. R. 350 n.; S. C. 4 Bro. P. C. 27; *Pilans v. Van Mierop*, 3 Burr. 1663;

Walker v. Walker, Holt, 328; Plowd. 305 a, 308 b; *Lees v. Whitcomb*, 5 Bing. 34; *Calthorpe's Case*, Dy. 336 b.

sideration, is *nudum pactum* (3), and cannot be enforced (c)(4); but it is a sufficient consideration for such a promise, if the party to whom the promise is made, grants any suspension or forbearance of his right, or sustains or is exposed to any detriment, damage, or inconvenience, in consequence of the act done or forborne by him (d); or if the party in whose favour the promise is made, or given, derives any benefit or advantage from the promise (e).

The least spark of a consideration, (if it amounts to a *good and sufficient consideration in law*, and falls within the rule above laid down,) seems to be sufficient to support a collateral promise (f); and it is not essential that any benefit should accrue to the party promising (g).

(c) *Pillans v. Van Mierop*, 3 Burr. 1663.

(d) *Pillans v. Van Mierop*, 3 Burr. 1663; *Stone v. Withepoole*, Ow. 94; *Copper v. Dickenson*, 3 Bulstr. 70; *Jones v. Ashburnham*, 4 East, 455; *Smith v. Jones*, Ow. 133; *Best v. Jolly*, 1 Sid. 38; *Longridge v. Dorville*, 5 B. & Ald. 117; and see the judgment of the Court in *Freeman v. Freeman*, 2 Bulstr. 269.

(e) *Stone v. Withepoole*, *supra*; and see the judgment in *Freeman v. Freeman*, *supra*; *Longridge v. Dorville*, *supra*; *Jones v. Ashburnham*, *supra*; and see the observation of Buller, J., in *Nerot v. Wallace*, 3 T. R. 17.

(f) *Pillans v. Van Mierop*, 3 Burr. 1663; *Pullen v. Stokes*, 2 H. Blk. 312; *Smith v. Jones*, Ow. 133; *Bailey v. Croft*, 4 Taunt. 611; *Cotton v. Westcott*, 3 Bulstr. 187; *Dutchman v. Tooth*, 5 Bing. N. C. 577; and see *Longridge v. Dorville*, 5 B. & Ald. 117; *Copper v. Dickenson*, 3 Bulstr. 70; *Smith v. Algar*, 1 B. & Ad. 603; and the observations of Wood, B., in *Lilley v. Hewitt*, 11 Price, 494; and of Lord Ellenborough in *Phillips v. Bateman*, 16 East, 356.

(g) See the judgment of the Court in *Freeman v. Freeman*, 2 Bulstr. 269; and see *Stone v. Withepoole*, Ow. 94; *Bailey v. Croft*, 4 Taunt. 611.

(3) Mr. Justice Blackstone observes, in the 2nd vol. of his Commentaries (p. 445), that our law has adopted the maxim of the civil law, that *ex nudo pacto non oritur actio*: but the reader is referred to a very learned note of the Editor of the Treatise on Equity (vol. 1, p. 335), to show that the civil law did not consider a verbal agreement, *without consideration*, if attended with certain ceremonies, as *nudum pactum*.

(4) Bills of exchange and promissory notes, *primâ facie*, import a consideration, and it is therefore not necessary, except in particular cases, to give evidence of consideration *aliunde*.

Considerations are either *executory* or *executed*.

An *executory consideration* is where something is to be done by the party receiving the undertaking, subsequently to the giving of the promise (*h*); thus, if S. engages to be answerable for the payment of any goods which C. *shall* deliver to P., the delivery of the goods is the *consideration*, and when the delivery takes place, the consideration attaches (*i*), and a right of action accrues to C. to recover the amount, although the undertaking contain no promise on the part of C. to deliver the goods, and although no cross action could have been brought against C., either at the suit of S. or P., if the goods had not been delivered. In the above description of promise there is a benefit to the party who receives the goods, and a possible detriment to him who supplies them.

An *executed consideration* is where the act or thing *has been* done or performed, the same not having been done or performed in consequence of the previous request of the party engaging to be answerable (*j*), as if one happened to be in a shop, and there buying goods, and after he had bought the goods, another person being then present, says to the seller, "If he do not pay you, I will," such a promise is void for want of a sufficient consideration (*k*), for the debtor obtains no benefit from the promise of the third party, nor does the creditor suffer, nor is he exposed to any detriment or inconvenience (5). So where A.'s servant was arrested

(*h*) *Stapp v. Lill*, 1 Camp. 242; v. *Benson*, 2 Cr. & J. 94.
S. C. nom. Stadt v. Lill, 9 East, (*j*) *Thorner v. Field*, 1 Bulstr.
 348. 120.
 (*i*) *Stapp v. Lill*, *supra*; *Wood* (*k*) *Thorner v. Field*, *supra*.

(5) In *Mayhew v. Crickett*, (2 Swanst. 185; *S. C.* 1 Wils. C. C. 418,) the case, so far as it relates to the subject of consideration, was in substance as follows: Batteley was indebted to the defendants, his bankers, on the balance of accounts subsisting between them, in the sum of 1,000*l.*; to secure which, the bankers held a warrant of attorney

in London for a trespass, and I. S., who was well acquainted with the master, bailed the servant, and *afterwards* A. for his friendship promised to save him harmless, and I. S. was compelled to pay the condemnation money; it was held, that an action did not lie upon A.'s promise, because the bailing, which was the consideration, was past and executed before (*l*).

A consideration, therefore, which is executed, is not sufficient to support a subsequent promise, un-

(*l*) *Hunt v. Bate*, 3 Dy. 272 a.

to confess judgment, given to them by Batteley. The bankers being dissatisfied with the large balance due to them, informed Batteley, that unless he procured a joint note from persons of responsibility, they would take possession of his effects; and Batteley promising to give unexceptionable security, the bankers added, that, if they were satisfied with the security, they might advance 300*l*. more. The plaintiffs, Mayhew and Gent, having agreed to become sureties, two promissory notes for 650*l*. each, payable to the bankers on demand, were signed, the one by Batteley and Mayhew, and the other by Batteley and Gent. The bankers never advanced the further sum of 300*l*., or any part of it, and afterwards commenced an action against Mayhew upon his promissory note. A bill in equity was then filed by Mayhew against the bankers, charging that the note ought in equity to be considered as void, and given without consideration; for as no advance had been made, it ought not to be considered as a security for the existing debt. Before the common injunction was obtained for want of answer, the bankers recovered a verdict at law. Subsequently, the common injunction to stay execution was obtained, which the bankers, upon the filing of their answer, moved to dissolve; and Lord Eldon directed the injunction to be continued, *upon the terms, however, of Mayhew's paying the money into court without prejudice*.

It is submitted, with reference to the question under consideration, that the security given by Mayhew was invalid in the hands of the bankers, as against him, for want of a consideration; and that if a bill in equity had been filed by Mayhew in the first instance, and the common injunction obtained, such injunction would, upon a motion made by the bankers to dissolve it, have been continued, without the condition attached to it of paying the money into court; but it is to be observed, that Mayhew had, before the interlocutory order in equity was pronounced, allowed a verdict to be had against him, and which judgment at law would virtually have been overruled by the order made upon motion, if the injunction had been continued without the payment of the money into court; besides, it does not appear, from the report of the case, that there was any question available in Mayhew's favour which might not have been raised as well at law as in equity.

less indeed the act was done at the request of the party promising(*m*), for then the promise is not a naked one, but couples itself with the precedent request, and is therefore founded on a good consideration.

So in a case of an executed or past consideration, as where a debt is due from A. to B., a promise by S. to pay the debt upon the debtor's failing so to do, provided the creditor will give the debtor time for payment, and will abstain from pursuing legal measures to recover his demand, and the creditor accedes to the proposed terms of forbearance and delay, and grants such indulgence accordingly, such promise will be binding upon the surety; for the consideration of *forbearance* is a benefit to the debtor, and is attended with consequences that may be injurious to the creditor(*n*).

The forbearance, however, by the creditor, must, in order to constitute an adequate consideration for the promise, be for a definite or certain time(*o*), or for a considerable (*p*), reasonable(*q*), or convenient time(*r*); for the Court will adjudge what shall be said to be considerable, reasonable, or convenient: and an agreement to forbear indefi-

(*m*) *Sidenham and Worlington's Case*, 2 Leon. 224, pl. 286; *S. C.* Godb. 31, *nom. Sydenham and Worlington's Case*; *S. C. nom. Sidenham v. Worthington*, Cro. Eliz. 42, Com. Dig. tit. Action on the Case upon Assumpsit, B. 12; *Payne v. Wilson*, 7 B. & Cress. 423; *S. C.* 1 Man. & Ry. 708; *Emmott v. Kearns*, 5 Bing. N. C. 559; *Craske v. Johnson*, 2 Bulstr. 74; *Pillans v. Van Mierop*, 3 Burr. 1663; and see *Hayes v. Warren*, Kelynge, 117.

(*n*) *Sadler v. Hawkes*, 1 Roll. Abr. 27, pl. 49; *Smith v. Algar*, 1 B. & Ad. 603; *Reynolds v. Prosser*, Hardr. 71; *Payne v. Wilson*, 7 B.

& Cress. 423; *S. C.* 1 Man. & Ry. 708; *Best v. Jolly*, 1 Sid. 38; *Tricket v. Mandlee*, 1 Sid. 45; and see *Thomas v. Williams*, 10 B. & Cress. 664.

(*o*) *Reynolds v. Prosser*, *supra*; *Hatch and Capel's Case*, Godb. 202; *Tricket v. Hanby*, 1 Keb. 114; *S. C. nom. Tricket v. Mandlee*, 1 Sid. 45.

(*p*) *Mapes v. Sidney*, Cro. Jac. 683.

(*q*) *Lingen v. Broughton*, 3 Bulstr. 206; and see *Johnson v. Whitcott*, 1 Roll. Abr. 24, pl. 33.

(*r*) *Tricket v. Maudlee*, 1 Sid. 45; *Sadler v. Hawkes*, 1 Roll. Abr. 27, pl. 49.

nately(*s*), or for a short(*t*), or some(*u*), or a little time(*v*), will be held bad for uncertainty.

It must also be shown that the party who forbears, had a right which he could have exercised with effect against the party forborne; for if he had no such right, there could be no detriment on the one hand, or benefit on the other(*w*). This right may be affected either from there being no debt or liability to be forborne or delayed, or (there being a debt) from its not being shown that there is any person whom the party promising to forbear, could sue; or from there being an incapacity to sue in the party promising to forbear; thus, if A. and B. are bound jointly and severally in a bond, and the obligee releases A., B. is by operation of law discharged from the debt, as well as the obligor released; and if a third party afterwards promise to pay the obligee the money secured by the bond, provided the obligee give B. time for payment, such a promise is *nudum pactum*; for there being no debt, there is no consideration for the promise by such third party(*x*). So where the plaintiff declared that A., since deceased, was indebted to him in a certain sum, and after his death, in consideration of the premises, and that he at the defendant's instance would forbear and give day of payment of the debt, (not stating to whom he was to forbear,) the defendant promised, &c.; it was held on demurrer to be no consideration for the promise, for unless there was some person whom the plaintiff could have sued for his debt,

(*s*) *Philips v. Sackford*, Cro. Eliz. 455.

(*t*) *Tolhurst v. Brickenden*, Cro. Jac. 250.

(*u*) See *Tricket v. Mandlee*, 1 Sid. 45; 1 Roll. Abr. 23, pl. 26.

(*v*) 1 Roll. Abr. 23, pl. 25; *Sackford v. Philips*, 3 Bulstr. 207, cit.; see *Tricket v. Mandlee*, 1 Sid. 45.

(*w*) See the observations of Lord Kenyon, C. J., in *Nerot v. Wallace*, 3 T. R. 17; and of Lord Ellenborough, C. J., in *Jones v. Ashburnham*, 4 East, 455; and cases *infra*.

(*x*) *Hammon v. Roll*, March, 202; *S. P. Rampston and Bowmer's Case*, 3 Leon. 98, pl. 141.

(which did not appear,) his forbearance was no detriment to him (*y*). So where the declaration stated, that there were controversies between the plaintiff and the defendant for the profits of certain lands, which the defendant's father had taken in his life-time, and that the plaintiff intended to sue the defendant in Chancery, and that the defendant, in consideration that the plaintiff would stay his intended suit, promised, that if the plaintiff could prove that the father of the defendant took the profits, or had possession of the land under the title of the plaintiff's father, he would pay him for all the said profits, and then averred that the plaintiff had proved that the defendant's father had taken the profits under the title of the plaintiff's father; it was held, that the promise was void, for it was not shown that the plaintiff was heir or executor of his father, and therefore Chancery would not give him any remedy (*z*). So where the plaintiff declared that the ancestor of the defendant became bound to him in a certain sum, and afterwards died, and that he demanded it of the defendant, being his heir, and that the defendant, in consideration that the plaintiff would forbear to sue him for such a time, promised to pay him, and the plaintiff then averred forbearance, and that the defendant had not paid the money, and it was held, that the action would not lie, since it was not shown that the heir was expressly bound in the bond, and the consideration was not to forbear to sue generally, but to stay a suit against the defendant whom he could not sue (*a*): but where S., together with P., was bound to C. for the proper debt of P., and S. paid the money, and P. died,

(*y*) *Jones v. Ashburnham*, 4 East, 455.

(*z*) *Toley and Windham's Case*, 2 Leon. 105, pl. 133; *S. C. nom.*

Tooley v. Windham, Cro. Eliz. 206.

(*a*) *Barber v. Foz*, 1 Ventr. 159; *S. C.* 2 Saund. 136.

and made E. his executor, and E., in consideration that S. would forbear to sue him until such a time, promised to pay him; it was held a sufficient consideration to support the promise, for the executor was liable in equity (*b*).

And again, where the plaintiff declared that J. S. owed him 20*l.* for the arrears of an annuity, and that the defendant was receiver of the rents of J. S., and appointed by J. S. to pay the plaintiff his 20*l.*, and that the defendant, in consideration that the plaintiff would forbear him to such a time, promised he would pay him, if he lived and continued receiver, and a verdict having been found for the plaintiff, it was moved, in arrest of judgment, that it did not appear that the defendant had at the time of the promise any of the rents of J. S. in his hands, and then the forbearing of him could be no consideration, because not liable to any suit: but the Court held that it being shown that he was receiver at the time of the promise, and averred that he so continued, it was a strong intendment that he had assets in his hands, especially after a verdict (*c*). So in *Willatts v. Kennedy* (*d*), it appeared that the plaintiff had been appointed by the Court of Chancery receiver of the debts of a certain firm, and that in consideration that the plaintiff, *as such receiver*, would give to one of the debtors of such firm two months' time to pay his debt, the defendant promised to pay, in case the debtor should omit to do so within that time: the debtor failed to pay the debt within the time limited, and the plaintiff obtained a verdict. Upon a motion made in arrest of judgment, the question was, whether the plaintiff had authority to contract and sue for the debts of the firm, and, as incidental to that authority, to suspend

(*b*) *Scott v. Stevens*, 1 Sid. 89.

2 Lev. 20.

(*c*) *Davison v. Haslip*, 1 Ventr.

(*d*) 8 Bing. 5.

152; *S. C. nom. Davison v. Heslop*,

payment according to a reasonable discretion, and the Court thought that the jury might reasonably presume, that the plaintiff had authority to do that which the defendant requested him to do ; that after verdict, the plaintiff was sufficiently connected with the cause of action, and there was no ground for considering him a stranger, and that a reasonable discretion in granting forbearance to a debtor was not incompatible with his duty as receiver.

II. What is a sufficient statement of the consideration in writing.

By the common law of England, a consideration has at all times been necessary to make a contract not under seal binding ; and to render valid a promise by one person, to be answerable for the debt, default, or miscarriage of another, the Statute of Frauds requires, that both the promise, and the inducement or consideration for that promise, shall be stated in writing (*e*), and parol evidence of such consideration is inadmissible.

The written agreement on which the plaintiff declares, (and if there are two or more distinct writings which can be connected or taken together, the whole forming but one transaction, they may constitute a “ memorandum of agreement ” within the Statute of Frauds,) (*f*), must either state the consideration in express terms on the face of the instrument (*g*), or the consideration must by reasonable

(*e*) *Wain v. Warlters*, 5 East, 10 ; *Saunders v. Wakefield*, 4 B. & Ald. 595 ; *Clancy v. Piggott*, 2 Ad. & Ell. 473 ; *Jenkins v. Reynolds*, 3 Brod. & B. 14 ; *S. C.* 6 J. B. Moo. 86 ; *Hawes v. Armstrong*, 1 Bing. N. C. 761 ; *Morley v. Boothby*, 3 Bing. 107 ; *S. C.* 10 J. B. Moo. 395 ; *James v. Williams*, 5 B. & Ad. 1109 ; *Cole v. Dyer*, 1 Cr. & J. 461 ; *S. C.* 1 Tyrw. 304.

(*f*) *Coe v. Duffield*, 7 J. B. Moo.

252 ; *Stead v. Liddard*, 1 Bing. 196 ; *S. C.* 8 J. B. Moo. 2 ; *Dobell v. Hutchinson*, 3 Ad. & Ell. 355 ; *Allen v. Bennet*, 3 Taunt. 169 ; *Western v. Russell*, 3 Ves. & B. 187 ; *Tawney v. Crowther*, 3 Bro. C. C. 318 ; *Saunderson v. Jackson*, 2 Bos. & P. 238 ; and see *Sandilands v. Marsh*, 2 B. & Ald. 673.

(*g*) *Stadt v. Lill*, 9 East, 348 ; *S. C. nom. Stapp v. Lill*, 1 Camp. 242.

construction be collected or implied from the whole tenor of the writing; not as a matter of conjecture merely, but with a fair degree of certainty (*h*). If it is doubtful whether the consideration relates to a past or future transaction (*i*), or if several, or even two distinct considerations, may with equal propriety be inferred as the inducement for the surety's engagement (*j*), the writing is not taken out of the operation of the Statute of Frauds, and consequently can give no right of action to the creditor.

The written agreement may either have expressed upon it, 1st. A good consideration; 2ndly. No consideration, or no sufficient consideration; or, 3rdly. A consideration which is in part sufficient, and in part insufficient.

With respect to the last of these branches, it may be observed the rule of law is, that if the promise is *entire*, and is void in part, it is void altogether, and the plaintiff consequently cannot recover upon such an agreement (*k*); but if the good part can be separated from the bad part, and the declaration is so framed as to meet the proof of that part of the contract which is good, such part will be sustained (*l*) (6).

The following are some of the cases of guarantees which have been decided with reference to the

(*h*) See *Hawes v. Armstrong*, 1 Bing. N. C. 761.

(*i*) *Jenkins v. Reynolds*, 3 Brod. & B. 14; *S. C.* 6 J. B. Moo. 86; *Morley v. Boothby*, 3 Bing. 107; *S. C.* 10 J. B. Moo. 395.

(*j*) *Cole v. Dyer*, 1 Cr. & J. 461;

S. C. 1 Tyrw. 304.

(*k*) *Thomas v. Williams*, 10 B. & Cress. 664; *Lexington v. Clarke*, 2 Ventr. 223; *Chater v. Beckett*, 7 T. R. 201.

(*l*) *Wood v. Benson*, 2 Cr. & J. 94.

(6) So if the promise is in part original and in part collateral, and the contract is not reduced into writing, although the party to whom the promise has been given cannot recover in respect of that part of the promise which is collateral, he may, nevertheless, recover in respect of that part which is an original promise, if it can be separated from that part which is collateral. (*Lyde v. Higgins*, 1 Smith, 305.)

question of the statement of the consideration. They may be classed under the three following heads: namely, 1st. Those where the consideration sufficiently appears upon the written agreement; 2ndly. Where no consideration, or no sufficient consideration appears; and, 3rdly. Where the consideration is in part sufficient, and in part insufficient.

1st. Where the consideration sufficiently appears upon the written agreement.

"I guarantee the payment of any goods which I. Stadt *delivers* to John Nicholls" (*m*).

"We agree and engage to guarantee for what twist Thomas Tapp *may* purchase of you, from the 28th ultimo, to the 1st of January, 1808" (*n*).

In the above cases the consideration is executory or prospective, the stipulated delivery and sale of the goods being the consideration appearing upon the face of the writings.

"Entertaining the highest opinion of Mr. Patrick Considine's integrity of character, as well as propriety of conduct, we therefore hold ourselves responsible to you in the sum of 500*l.* sterling, for his discharging faithfully and honestly any duty assigned to or trust reposed in him" (*o*). Held that the letter was to be understood as though it expressed a promise to be responsible for Mr. Considine, if the person to whom the letter was addressed would employ him, being tantamount to saying, "If you *will* employ Mr. Considine, we will guarantee his fidelity" (7).

(*m*) *Stadt v. Lill*, 9 East, 348; 286.

S. C. nom. Stapp v. Lill, 1 Camp.

(*o*) *Lysaght v. Walker*, 5 Bli. N. S. 1.

(*n*) *Ex parte Gardom*, 15 Ves.

(7) It appeared that at the time when the above letter or guarantee was written, Mr. Considine had no situation or employment under the persons to whom it was addressed or given, but that circumstance is allowed to have no weight in the construction of the written agreement.

"To Mr. John Newbury,

"Sir,

"I, the undersigned, do, hereby agree to bind myself to be security to you for Mr. I. Corcoran, *late* in the employment of Mr. Ransom, for whatever you *may* intrust him with *while in your employ*, to the amount of 50*l.*, in case of default to make the same good"(*p*). It was held, that the words are all prospective, and that it may be fairly implied that Mr. Corcoran had left one service, and that the guarantee was given in consideration of his being taken into another; or, "If you *will* intrust one who has left the service of another," &c.

"I do hereby agree to become surety for Mr. R. G., now your traveller, in the sum of 500*l.*, for all money he *may* receive on your account"(*q*). It was held, that the consideration for the guarantee was the continuance of the traveller in the service of the plaintiffs.

"December 24.

"I herewith hand you drafts drawn by Mr. Wallis, and accepted by Mr. Bromley, and indorsed by R. Burns, and should the bills not be honoured when due, I promise to see that they do so"(*r*). It was held, that it appears, in consideration that the plaintiff would take the notes, the defendant would indemnify him (8).

(*p*) *Newbury v. Armstrong*, 6 Ry. 62.
 Bing. 201; S. C. 4 Car. & P. 59; (*r*) *Morris v. Stacey*, Holt, N.
 S. C. Mood. & M. 387. P. C. 153.
 (*q*) *Ryde v. Curtis*, 8 Dowl. &

(8) The defendant acted as an agent, and had ordered some shoes from the plaintiff, and proposed to give bills in payment, (but to which bills he was no party,) the plaintiff pressed the defendant to indorse the bills, but the latter told the plaintiff he would not indorse them, but would give him a letter of guarantee, which would do as well, and accordingly gave him the above guarantee.

" London, 14th August, 1818.

" Messrs. Boehm & Co.

" Gentlemen,

" Our mutual friends, Messrs. Sawyer, Tobler, & Co., having accepted the under-written bill drawn on them by your firm, I hereby give my guarantee for the due payment of the same, should it be dishonoured by the acceptors" (s). Then followed a *copy* of the bill guaranteed, which was dated Antwerp, 1st August, 1818, and was drawn by Boehm & Co. upon, and accepted by, Sawyer & Co., and purported to secure 1,026*l.* 7*s.* 6*d.* three months after date. It was held, that the consideration was sufficiently expressed; namely, that in consideration that the plaintiffs *would take* a bill drawn on, and accepted by, Sawyer & Co., the defendant undertook to guarantee the payment of it, in the event of its being dishonoured (9).

(s) *Boehm v. Campbell*, 8 Taunt. 679; S. C. 3 J. B. Moo. 15.

(9) It appears from the report, that the plaintiffs had shipped corn for Sawyer & Co. to the amount of 999*l.* 17*s.* 6*d.*, and that the plaintiffs held the acceptance of Sawyer & Co. for that sum, but suspecting their solvency, the plaintiffs had applied to the defendant to give them a guarantee, without which they refused to part with the bill of lading of the corn. Upon this the defendant wrote the above letter. The sum for which the bill was drawn above the price of the corn, was made up by adding the insurance, and other charges.

The consideration for which the guarantee was in fact given, namely, to enable the person to whom the corn had been shipped, to obtain possession of the bill of lading, and consequently the absolute disposition of the corn, would, but for the Statute of Frauds, have been sufficient, but the question to be considered since the passing of the Statute, is, whether the consideration which was suggested by the Court, as the foundation for the promise, can be said to be expressed upon the face of the instrument. The case of *Boehm v. Campbell* was considered by Dallas, C. J., to be similar to *Morris v. Stacey*. (See *supra*.) But it is to be observed, that, in the latter case, it appears upon the undertaking, that the bills were delivered *simultaneously* with the guarantee, but from the undertaking in the case of *Boehm v. Campbell*, for any thing that appears to the contrary, *the creditor was then, and possibly had been for some time, in the possession of the accepted bill.*

" Sir,

" Mr. Livie having chartered your ship Robert to bring a cargo of timber from New Brunswick, and the same being landed to the charterer, and he having paid you one-half of the freight, and given you his acceptance for the remaining half at four months' date, I engage to be accountable to you for the amount of said acceptance, should it not be paid when due" (*t*). It was held to be not distinguishable from *Boehm v. Campbell*, and that it must necessarily be inferred that the plaintiff would not have taken Mr. Livie's acceptance for the remainder of the freight due to him, unless the due payment of it were guaranteed.

" Payne plaintiff, and Vaux defendant.

" Mr. R. Payne having, *at my instance and request*, consented to suspend proceedings against the above-named defendant on the cognovit signed by him in this cause, and given for payment of the debt this day, I do hereby, in consideration thereof, personally undertake and promise to pay to the plaintiff the sum of 30*l.* on account of the said debt on the 1st day of April now next, and the further sum of 53*l.* 3*s.* within four months next ensuing the 1st day of April" (*u*). It was held, that as the request must have preceded the consent to suspend proceedings, the contract might be considered as executory, and that the consideration for the promise was, that the plaintiff would suspend his proceedings against Vaux, the defendant in the action, at all events until the 1st day of April.

So where it appeared that one Major Walsh owed the plaintiff 23*l.* 10*s.* for the hire of a cabriolet, and that the defendant (who was Walsh's attorney) had

(*t*) *Pace v. Marsh*, 1 Bing. 216; Cress. 423; S. C. 1 Man. & Ry. 708.
S. C. 8 J. B. Moo. 59.

(*u*) *Payne v. Wilson*, 7 B. &

written the following letter to the plaintiff, at a time when Walsh was about to go abroad, and the plaintiff had been pressing for his debt :—

“ Red Lion Square, 24th March, 1838.

“ Major Walsh being again disappointed in receiving remittances, and you expressing yourself inconvenienced for money, I enclose you his acceptance, payable here at two months; you may put your name as drawer, and safely pay it away.

W. M. Kearns :”

and that the plaintiff then called on the defendant to say he would not take the bill unless the defendant put his name to it, whereupon the defendant wrote on the back of the above letter, — “ I never put my name to bills : respectable professional men should not, but I will see it paid for Major Walsh.

W. M. K.”

It was held, that the defendant’s indorsement on the letter, which he had himself forwarded with the bill of exchange to the plaintiff, amounted to this : — “ In consideration of your forbearing to sue Major Walsh for two months, I will pay the bill if he fail to do so ” (v).

“ The bearer, D. Williams, has a sum of money to receive from a client of mine some day next week, and I trust you will give *indulgence* till that day, when I undertake to see you paid ” (w). It was held sufficient to charge the defendant with the debt due from Williams, upon parol proof of its amount, and that Mr. Gwyn, to whom it was addressed, was the attorney of the plaintiff, and received the letter in that character from Williams the bearer, and not as the creditor or principal of Williams.

“ You will be so good as to withdraw the pro-

(v) *Emmott v. Kearns*, 5 Bing. N. C. 559.

(w) *Bateman v. Philips*, 15 East, 272.

missory note, and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole 45*l.*" (*x*). It was held, that the consideration, namely, the withdrawing of the note, was sufficiently stated to satisfy the statute, though the amount and maker's name were not specified, there being no evidence of any other note to which the agreement could apply.

"I hereby guarantee to you the payment of the proceeds of the goods you have consigned to my brother, John Tooth, of Sydney, in your ship the John Woodall, Captain Henderson, and also any future shipments you may make to him, in consideration of the sum of 2*s.* 6*d.* paid me, which I hereby acknowledge to have received" (*y*). It was held, that the consideration for the promise to guarantee the payment of the goods consigned to the defendant's brother before the guarantee was given, (as well as those which were consigned afterwards,) appeared upon the writing, although the undertaking did not disclose by whom the 2*s.* 6*d.* was paid: the fair intendment being, that it was paid by the plaintiff to the defendant.

2ndly. Where no consideration, or no sufficient consideration, appears upon the written agreement.

"Messrs. Wain & Co. : I will engage to pay you by half-past four this day, 56*l.* and expenses, on bill that amount on Hall" (*z*).

"As you have a claim on my brother for 5*l.* 17*s.* for boots and shoes, I hereby undertake to pay you the amount within six weeks, say the 4th January, 1833" (*a*).

(*x*) *Shortrede v. Cheek*, 1 Ad. & Ell. 57.

(*y*) *Dutchman v. Tooth*, 5 Bing. N. C. 577.

(*z*) *Wain v. Warlters*, 5 East, 10.

(*a*) *James v. Williams*, 5 B. & Ad. 1109.

It was held, in the last two cases, that no inference can be drawn that the consideration for the promise was forbearance.

“Mr. Wakefield will engage to pay the bill drawn by Pitman in favour of Stephen Saunders”(b).

“I hereby agree to see you paid within three months from the date hereof, the amount of 50*l.*, due to you on account of Mr. George Moore, jun., Sheffield”(c).

“I have enclosed you the bills drawn *per* I. T. Armstrong, upon and accepted by Leonard Dell, which I doubt not will meet due honour, but in default thereof I will see the same paid”(d).

“Mr. Richard H. Chase, of the Office of Ordinance, Barbadoes, about to proceed thither in the Mary, having incurred an account with you, amounting to 49*l.* 5*s.*, with the understanding that he is to transmit the amount to you three months after he shall have arrived at Barbadoes, we hereby guarantee his performance of the said engagement, and in failure thereof, we will be responsible to you”(e).

“R. Ridley, plaintiff, and James Ashdown,
defendant.

<p>“Debt - £6 11 11 Costs - 4 18 4 <hr/>£11 10 3 <hr/></p>	<p>We, the undersigned, jointly and severally undertake and agree to pay George C. Cole, gentleman, the debt and full costs in this action,</p>
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(b) *Saunders v. Wakefield*, 4 B. & Ald. 595.

(c) *Clancy v. Piggott*, 2 Ad. & Ell. 473.

(d) *Hawes v. Armstrong*, 1 Bing. N. C. 761.

(e) *Ellis v. Levi*, 1 Bing. N. C. 767, *in notis*.

provided, on or before the 1st day of January, 1831, a sum of 11*l.* 10*s.* 3*d.*, be not paid to him, the said George Cole, at his office, as the attorney for the plaintiff" (*f*).

" To Messrs. Jenkins and Jones,

" Gentlemen,

" To the amount of 100*l.*, be pleased to consider me as security on Mr. James Cowing and Co.'s account" (*g*).

" Messrs. Morley and Co.,

" We hereby promise that your draft on William Clarke, Son and Co., due at Messrs. Masterman's, at six months, on the 27th of November next, shall be then paid out of money to be received from Saint Philip's Church, say amount 174*l.* 13*s.* 5*d.*" (*h*).

" I, the undersigned, agree to pay the debt and costs in this action" (*i*).

" I hereby engage to pay you on Mr. Thomas Lamb's account, 30*l.*, at the expiration of the usual credit, in the event of any deficiency on his part so to do" (*j*).

So where the defendant on occasion of there being a great run on a banking-house, went to the bank, and told the holders of notes issued by the bank, who were waiting for payment, that he had come to a resolution to support the bank with 30,000*l.*, at which the holders then present were satisfied, and said they would take no more money than was necessary, and would keep the rest of their notes till they got again into currency, and afterwards the defendant signed the following written paper: " I do hereby authorize Mr. George

(*f*) *Cole v. Dyer*, 1 Cr. & J. 461.

107; *S. C.* 10 J. B. Moo. 395.

(*g*) *Jenkins v. Reynolds*, 3 Brod. & B. 14; *S. C.* 6 J. B. Moo. 86.

(*i*) *Evans v. Duncombe*, 1 Cr. & J. 372.

(*h*) *Morley v. Boothby*, 3 Bing.

(*j*) *Atkinson v. Carter*, 2 Chit. 403.

Bowling to assure the inhabitants of Pembroke and its vicinity, that I do hereby undertake to be accountable for the payment of the notes issued by the Milford Bank, so far as the sum of 30,000*l.* will extend to pay, which will be an additional security to the public to that amount, to the estate and effects of Charles Allan Phillipps and Thomas Phillipps, esquires, the partners in the said bank" (*k*).

3rdly. Where the consideration which appears upon the written agreement is in part sufficient, and in part insufficient.

"I do hereby undertake to pay for the gas that *may* be consumed in the Minor Theatre at Manchester, and for the lamps outside during the time it is occupied by my brother-in-law, and I engage for *all the arrears now due*" (*l*). It was held, that the con-

(*k*) *Phillipps v. Bateman*, 16 East, 356, (1).

(*l*) *Wood v. Benson*, 2 Cr. & J. 94, (2).

(1) In this case an action was brought against the defendant upon his undertaking, by an individual holder of some of the notes who had taken them after notice of such undertaking, but before the bank stopped payment, which took place shortly after the undertaking was given, and although the Court was of opinion that no consideration appeared upon the undertaking for the promise, the case was decided upon the ground, that there was no contract between the plaintiff and the defendant; the promise of the defendant not being a promise to an individual, but only a promise to add 30,000*l.* to the then failing funds of the Milford Bank.

(2) The guarantee declared on in the case of *Russell v. Moseley*, (6 J. B. Moo. 521, and 3 Brod. & B. 211,) very closely resembles the above guarantee in *Wood v. Benson*; the guarantee in the former case was as follows: "I hereby guarantee the present amount of Miss Harriett Moseley, due to R. T. Shortridge and Co., South Shields, of 112*l.* 4*s.* 4*d.*, and what she may contract from this date to the 30th of September next." It appeared upon the trial that Harriett Moseley was indebted to the plaintiffs at the time the guarantee was given to them, in the sum of 112*l.* 4*s.* 4*d.*, upon a balance of accounts between her and them in respect of goods furnished to her in the plaintiff's trade and business of glass merchants, and that in consequence of the guarantee, the plaintiffs sold to her other goods in their said trade or business of glass merchants, of the value of 150*l.* Dallas, C. J., before whom the cause was tried, being of opinion that no sufficient consideration for the promise was expressed on the face

tract resolved itself into two parts, the one to pay for all the gas which *may* be consumed, which is prospective, or executory, and therefore good; the other, to pay for all the arrears *then due*, which is past, or executed, and for which there is no consideration expressed on the instrument to support it, and which is consequently void.

To the rule above laid down, requiring that in all collateral undertakings, the *consideration* for the promise must be stated in writing, there seems to be the exception which has been before adverted to, (see *ante*, p. 3,) that if the party giving the undertaking is an attorney of one of the courts at Westminster, and gives such undertaking in that character, a court of law, in the exercise of the control which it has over its officers, will compel the attorney to perform the undertaking, and will not allow him who is deemed to be conusant of the law, by entering into a contract which he either knows, or ought to have known, is void, to deprive the party of his remedy, and then take advantage of his own wrong (*m*) (3).

(*m*) *Evans v. Duncombe*, 1 Cr. 1 Cr. & J. 374, *in notis*. & J. 372; and see *in re Greaves*,

of the instrument, directed a non-suit, but gave the plaintiffs leave to move to set it aside, and enter a verdict for them for 150*l.*, or any less sum the Court should think they might be entitled to recover under the guarantee. The parties, however, seem to have come to a compromise. (See the report of the case in J. B. Moore.)

(3) Many of the cases which have been determined upon the point as to the statement of the consideration, have turned on distinctions extremely nice, and indeed it appears difficult to reconcile all the cases.

Dallas, C. J., under the impression that the decision of *Wain v. Warlters* (5 East, 10) had been shaken by the opinions expressed by Lord Eldon in *ex parte Minet* (14 Ves. 189), and in *ex parte Gardom*, (15 Ves. 287), and conceiving also, that the doctrine laid down in *Wain v. Warlters*, and in the cases which followed it, enabled persons (who after due caution and deliberation had submitted to be bound for the responsibility of others, and thereby occasioned extensive credit to be given upon the faith of such indemnities) to escape from the engagements they had so deliberately entered into (see *Boehm v. Campbell*, 8 Taunt. 679; S. C. 3 J. B. Moo. 15); in his anxiety to dis-

III. What is a sufficient memorandum, or note of the agreement.

cover upon the written agreement a consideration stated to sustain the promise, appears, in the two cases of *Boehm v. Campbell*, and *Pace v. Marsh* (see *ante*, pp. 66 and 67), to have fixed upon considerations which the language of the guarantees can scarcely warrant. The late Chief Justice of the Court of Common Pleas (see *Morley v. Boothby*) has expressed his disapprobation of the decisions in both of the last-mentioned cases. "In both cases," the same learned Judge observes, "a by-gone consideration was expressed on the guarantees, and as the guarantees did not show any advantage to the persons in whose favour they were made, or any inconvenience suffered by the persons to whom they were given, the promises were invalid."

The opinion which Lord Eldon is reported to have expressed upon the decision of *Wain v. Warlters*, is (as every opinion entertained by that eminently learned judge must be) entitled to the greatest possible attention and respect; but at the same time it must not be forgotten, that the judgments of Lord Eldon in the cases in bankruptcy above referred to, are not (and indeed no case which his Lordship has decided, is) in opposition to the doctrine contained in *Wain v. Warlters*; in each of the cases reported in Vesey, jun., there is a sufficient consideration for the promise stated upon the face of the undertaking.

Admitting, however, the principle laid down in the case of *Wain v. Warlters*, as to the interpretation of the Statute of Frauds, to be correct, namely, that the Statute requires the consideration for the promise, as well as the promise itself, to be in writing, it may, nevertheless, be doubted, whether if the last-mentioned case were now to be decided for the first time, the guarantee upon which the question arose would not receive a more liberal interpretation than that which it then received.

It is stated by Patteson, J., in the case of *James v. Williams*, (5 B. & Ad. 1109,) that if the consideration can be reasonably collected or implied, it is sufficient, and by the present learned Chief Justice of the Court of Common Pleas, in the case of *Newbury v. Armstrong*, (Mood. and M. 389,) that if the Court can by fair construction as it were "spell out" the consideration from the contract, it is enough. Now it is perfectly clear, that if there is an existing debt between D. and C., and D. is apprehensive of being sued for that debt, and I. S. on the behalf of D. give his undertaking in writing to the creditor, whereby he engages to pay the money D. owes him, provided he forbears to sue D. until half-past four in the day, and the creditor forbears accordingly, I. S. will be liable. Any time forbore, however short, if definite, is sufficient to support the promise; it may be of consequence to the debtor, or of detriment to the creditor. (See *ante*, pp. 55 and 58, and the judgment of Patteson, J. in *James v. Williams*.) Can it then be said, that if I. S. by his written undertaking agrees to pay the creditor the debt due to him from his debtor by half-past four this day, (see the guarantee in *Wain v. Warlters*, *ante*), and the creditor waits till that period has expired, that it may not be reasonably collected or implied from the written agreement, that the

The word "agreement," in the 4th section of the Statute of Frauds, is satisfied, if the writing states the subject-matter of the contract, the consideration, and is signed by the party to be charged (*n*); and it is not essential to the validity of the writing that it should show mutuality (*o*), (namely, by making it obligatory on the creditor to do that in favour of the principal, which it was the object of the surety to induce the creditor to do, when the surety gave him his indemnity, or rendering the creditor liable to a cross-action by the surety, or the principal, if he did not,) it is sufficient if the party sued is shown to be liable (4).

Nor need the writing (if it disclose the real substance of the cause of action, and render it unneces-

(*n*) *Per* Tindal, C. J., in *Laythorp v. Bryant*, 2 Bing. N. C. 735.

(*o*) *Stadt v. Lill*, 9 East, 342; *S. C. nom. Stapp v. Lill*, 1 Camp. 242; *Newbury v. Armstrong*, 6 Bing. 201; *S. C. 4 Car. & P. 59*;

S. C. 3 Moo. & P. 509; *S. C. Mood. & M. 389*; and see the observations of Parke, B., in *Mozley v. Tinkler*, 1 Cr. M. & Ros. 692; and of Patteson, J., in *Morton v. Burn*, 2 Ad. & Ell. 19.

consideration for the promise was the creditor's forbearance until the time mentioned?

The case of *Wain v. Warlters*, however, has received the sanction of a variety of judges in all the common law courts, and most (if not all) of the subsequent cases have been determined since the opinion of Lord Eldon was expressed. *Saunders v. Wakefield*, and *James v. Williams*, were decided in the Court of King's Bench; *Jenkins v. Reynolds*, and *Morley v. Boothby*, in the Court of Common Pleas; and the very recent case of *Cole v. Dyer* was decided in the Court of Exchequer. The authority, therefore, of the case of *Wain v. Warlters* cannot, it is conceived, at the present day be questioned, though, as the learned Chief Justice of the Court of Common Pleas has observed, (see *Mood. and M. 391*.) "the doctrine contained in that case, and those cases which have followed it, *has been carried to the extreme edge of the law*."

(4) If J. S. guarantee the payment of any goods which C. shall deliver to D., C. is not obliged to deliver any goods, but when the goods are supplied, a right of action against J. S. accrues to C. to recover the amount. So where a debt already exists between D. and C., and J. S. undertakes that if C. will give D. a certain definite time to pay the debt, and if D. does not then pay the debts J. S. will, C. is not bound to wait the time stated, but if he does so, and D. makes default in payment, J. S. becomes responsible.

sary to have recourse to oral testimony to explain the consideration for which it was given) set out all the circumstances in detail that may have been agreed on between the parties (*p*), or state the amount for which the surety was to be answerable (*q*), or even the name of the creditor for whom the surety intended his indemnity (*r*); in such cases, the amount of the debt, and the person to whom it is due, and for whom the guarantee was intended, may be explained by parol testimony,

- (*p*) See *Jenkins v. Reynolds*, 3 242; *Bateman v. Philips*, 15 East, Brod. & B. 14; S. C. 6 J. B. Moo. 272; *Shortrede v. Cheek*, 1 Ad. & 86; *Morris v. Stacey*, Holt, N. P. Ell. 57; *Newbury v. Armstrong*, C. 153. 6 Bing. 201; S. C. 4 Car. & P. 59.
 (*q*) *Ex parte Gardom*, 15 Ves. 286; *Stadt v. Lill*, 9 East, 348; S. C. nom. *Stapp v. Lill*, 1 Camp. 272, (5).
 (*r*) *Bateman v. Philips*, 15 East, 272, (5).

(5) The circumstances in *Bateman v. Philips* were these: the plaintiff was about to sue one D. Williams for a debt of 80*l.*, and had employed an attorney of the name of Gwyn for that purpose, when the defendant addressed the following letter to Mr. Gwyn:—"The bearer, David Williams, has a sum of money to receive from a client of mine some day next week, and I trust you will give indulgence till that day, when I undertake to see you paid." Mr. Gwyn was called as a witness at the trial to prove that this letter was addressed to him as the attorney for the plaintiff, and that it was brought to him by Williams, and the amount of the debt due from Williams to the plaintiff was also proved. It was objected that the name of the plaintiff was not mentioned in the letter, nor the amount of the debt, but it was held that the parol evidence did not go to extend the terms of the agreement in writing, but only to show that the letter was addressed to Mr. Gwyn, as the attorney for the plaintiff, and not as the principal or creditor of Williams.

In *Shortrede v. Cheek* an action had been brought upon the following guarantee: "You will be so good as to withdraw the promissory note, and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole 45*l.*" At the trial the plaintiff proved a promissory note for 35*l.* made by the defendant's son, and payable to the plaintiff, but not the memorandum:—the guarantee was proved, and a subsequent admission by the defendant that he had to pay the plaintiff 45*l.* due from his son. It was held, that the evidence was properly admitted to explain whether the promissory note was a note of the father or of the son, which the letter itself had left unexplained, and that the plaintiff was entitled to recover the amount of the promissory note, although he had not produced the memorandum.

It would seem, however, that if the defendant in the first case could have shown that Williams was indebted at the time to another client

such evidence not tending to extend, but to explain the terms of the written agreement.

The undertaking also will be good where the promise was originally verbal, but is, subsequently to its being acted upon, reduced into writing (*s*).

IV. What is a sufficient signing by the party, or his agent.

The signature required by the Statute is to have the effect of giving authenticity to the *whole* instrument (*t*); and where the name is inserted in such a manner as to have that effect, it does not much signify in what part of the instrument it is to be found (*u*); and it is no objection to the validity of an instrument signed by a surety, guaranteeing to the seller the price of goods, which it is arranged are to be furnished by the seller to the principal, and which are afterwards furnished by him, that neither the principal nor the surety could compel the seller to furnish the principal with those goods, by reason that the seller had never signed the guarantee (*v*).

To satisfy the Statute, there must be either an

(*s*) *Longfellow v. Williams*, Pea. Ad. Ca. 225.

(*t*) Sug. V. & P. p. 90, 7th ed.; and see *Stokes v. Moore*, 1 Cox, 219; *Selby v. Selby*, 3 Meriv. 2.

(*u*) Sug. V. & P. *supra*; and see *Stokes v. Moore*, *supra*; *Bird v. Blosse*, 2 Ventr. 361; *Laythoarp v. Bryant*, 2 Bing. N. C. 735; *Welford v. Beazely*, 3 Atk. 503; but see *Welford v. Beazely*, 1 Ves. 6; and Lord Eldon's observations in *Saunderson v. Jackson*, 2 Bos. & P. 238; and the case of *Tawney v. Crowther*, 3 Bro.

C. C. 318; with Lord Redesdale's observations in *Clinan v. Cooke*, 1 Sch. & L. 22, upon Lord Thurlow's judgment in *Tawney v. Crowther*.

(*v*) *Allen v. Bennett*, 3 Taunt. 169; *Laythoarp v. Bryant*, 2 Bing. N. C. 735; *Coleman v. Upcot*, 5 Vin. Abr. 527, pl. 17; *Cotton v. Lee*, 2 Bro. C. C. 564, cit.; and see *Egerton v. Mathews*, 6 East, 307; *Fowle v. Freeman*, 9 Ves. 351; and *Seton v. Slade*, 7 Ves. 265.

of Gwyn's, or the defendant in the second case could have shown that there were two notes for the same sum, but of different dates, or that there was one note given by the father, and another by the son, parol evidence could not have been received; for evidence so let in, would lead to the very perjury, or subornation of perjury, which it was the object of the Statute to exclude.

actual signing of the name (*w*), or something intended by the writer to be equivalent to a signature, as a mark by a marksman (*x*); and if a man be in the habit of printing instead of writing his name, he will be held to have signed by his printed name instead of his written name (*y*). But as a valid contract may be established by the evidence of several writings (*z*), it is sufficient if the party's signature appears to a writing, notwithstanding it does not contain the terms of the agreement, if it refer to another which does (*a*); and parol evidence will be admitted to show to what written agreement the instrument containing the signature refers (*b*), though if the party in the writing to which his signature is attached disclaims the undertaking relied on by the creditor, and to which the writing refers; as being the undertaking he had entered into, and refuses to fulfil it, parol evidence will not be permitted to connect the two instruments, for the writing relied on by the party endeavouring to establish the undertaking must be taken altogether, and then it falsifies the contract attempted to be proved (*c*).

An undertaking in the defendant's own handwriting, beginning "Mr. J. S. guarantees," &c. (*d*), or, "I, J. S., guarantee," &c. (*e*), it seems, will

(*w*) *Selby v. Selby*, 3 Meriv. 2; *Cotton v. Lee*, *supra*; *Egerton v. Mathews*, *supra*.

(*x*) *Selby v. Selby*, *supra*.

(*y*) *Saunderson v. Jackson*, 2 Bos. & P. 238; *Schneider v. Norris*, 2 M. & Sel. 286.

(*z*) *Tawney v. Crowther*, 3 Bro. C. C. 318; *Western v. Russell*, 3 Ves. & B. 187.

(*a*) *Tawney v. Crowther*, *supra*; *Western v. Russell*, *supra*; *Welford v. Beazely*, 3 Atk. 503.

(*b*) *Allen v. Bennet*, 3 Taunt. 169; *Western v. Russell*, 3 Ves. & B.

187; and see the judgment of Lord Ellenborough, C. J., in *Hinde v. Whitehouse*, 7 East, 558; *Powell v. Dillon*, 2 Ball. & B. 416; *Cass v. Waterhouse*, Pre. Ch. 29; and *Clinan v. Cooke*, 1 Sch. & L. 22.

(*c*) *Cooper v. Smith*, 15 East, 133.

(*d*) See *Western v. Russell*, 3 Ves. & B. 187; *Probert v. Parker*, 1 Russ. & M. 625.

(*e*) See *Knight v. Crockford*, 1 Esp. 190; *Lemayne v. Stanley*, 3 Lev. 1.

have the effect of legal signatures, and amount to such an authentication of the several instruments as is required by the Statute, although a place for the signature is left at the bottom which is never signed (*f*). But the giving of directions for the drawing up of the instrument (*g*), or an alteration of it by the party with his own hand (*h*), or even writing over the whole instrument with his own hand without signing it (*i*), or (generally speaking) the mere circumstance of the name of the party being written by himself in the body of the instrument (*j*), will not be held a sufficient signing to take the case out of the Statute.

The signature of one partner in a transaction relating to the partnership, binds all the partners (*k*), consequently, a guarantee given by one partner, if given in the regular course of dealing by the firm, will bind all the partners (*l*); and this, notwithstanding the partners should have agreed among themselves that no guarantee should be given by either of them (*m*); and even where a guarantee is given by one partner without the knowledge of the others, and which is not within the ordinary business transacted by the firm, if the transaction has reference to business transacted by the partnership, and is afterwards known, or ought, from the entries in the partnership books, to have been known to the other partners, the guarantee becomes

(*f*) See the observation of Lord Eldon, C. J., in *Saunderson v. Jackson*, 2 Bos. & P. 238.

(*g*) *Bowdes v. Amhurst*, Pre. Ch. 402; *S. C.* 1 Eg. Ca. Ab. 21, pl. 8; and see *the Earl of Glengall v. Barnard*, 1 Keen. 769.

(*h*) *Hawkins v. Holmes*, 1 P. Wms. 770.

(*i*) *Ithel v. Potter*, 1 P. Wms. 771, cit.

(*j*) *Stokes v. Moore*, 1 Cox, 219.

(*k*) *Sandilands v. Marsh*, 2 B. & Ald. 673; *Hope v. Cust*, 1 East, 53, cit.; *ex parte Gardom*, 15 Ves. 286.

(*l*) *Hope v. Cust*, *supra*; and see the observations of Lord Ellenborough, C. J., in *Crawford v. Stirling*, 4 Esp. 207.

(*m*) *Sandilands v. Marsh*, *supra*.

in point of law an assurance made by one partner with reference to business transacted by the others, and the firm will be bound (*n*); but inasmuch as it is not usual for merchants or persons embarked in trade to give (*o*), and it is not incidental to the general power of a partner to bind his co-partners by, a collateral engagement (*p*), a party seeking to have the benefit of such an engagement given in the partnership name, must show (beyond the relationship of partners) (*q*), that the party signing had authority from the other partners to sign in the name of the partnership, the instrument of suretyship declared on (*r*); or, that the guarantee had been acted on, and adopted by, the other partners (*s*); or, that there had been a previous course of dealing, in which similar guarantees had been given in the name of the partnership, with the privity of the other partners (*t*); or should prove a subsequent recognition by the firm of the act and assurance of the party signing (*u*), and any of which may be shown by parol evidence (*v*). If, however, a guarantee be signed by one partner in the name of himself and his co-partners, the partner signing having no authority from the others to do so, it seems it will be good to bind the party signing, and the party signing will be held to have described himself by the partnership firm, and be estopped from saying his name was

(*n*) *Sandilands v. Marsh*, *supra*; and see the observations of Lord Ellenborough, C. J., in *Crawford v. Stirling*, *supra*.

(*o*) See the observations of Lord Ellenborough, C. J., in *Ridley v. Taylor*, 13 East, 175; and see *Duncan v. Lowndes*, 3 Camp. 478; *Sandilands v. Marsh*, *supra*; *ex parte Peele*, 6 Ves. 602.

(*p*) See the observations of

Lord Ellenborough, C. J., in *Ridley v. Taylor*, *supra*; and see *Hope v. Cust*, *supra*; *Duncan v. Lowndes*, *supra*.

(*q*) *Duncan v. Lowndes*, *supra*.

(*r*) *Ex parte Peele*, *supra*.

(*s*) *Duncan v. Lowndes*, *supra*.

(*t*) *Duncan v. Lowndes*, *supra*.

(*u*) *Duncan v. Lowndes*, *supra*.

(*v*) *Duncan v. Lowndes*, *supra*.

other than that by which he signed the instrument (*w*).

V. Who will be deemed an agent lawfully authorized.

It seems that the creditor, or person to whom the guarantee is given, cannot be the agent for the surety (*x*); and the same reasoning would appear to apply to the principal debtor, or the person in whose favour the promise is given; but the agent may be a person incapable of acting in his own individual capacity, as an infant (*y*), or other disqualified person, as a married woman (*z*).

Where the instrument of suretyship is not an instrument under seal, the agent may be authorized by parol (*a*), although the collateral engagement, in order to bind the principal, must be in writing.

His authority may be either *expressed* or *inferred from circumstances* (2), and the fact of the agency,

(*w*) See *Elliot v. Davis*, 2 Bos. & P. 338; *Strangford v. Green*, 2 Mod. 228; and Lord Eldon's observations in *Underhill v. Horwood*, 10 Ves. 209.

(*x*) See *Wright v. Dannah*, 2 Camp. 203.

(*y*) Co. Litt. 52 a; Com. Dig. tit. Attorney, c. 4; *Watkins v. Vince*, 2 Stark. 368.

(*z*) Co. Litt. 52 a; Com. Dig. tit. Attorney, c. 4; *Emerson v.*

Blonden, 1 Esp. 142; *Paletthorp v. Furnish*, 2 Esp. 511, in n.

(*a*) See *Waller v. Hendon*, 5 Vin. Abr. 524, pl. 45; *Wedderburne v. Carr*, 3 Woodes. Lect. 423, cit.; *Coles v. Trecothick*, 9 Ves. 234; *Rucker v. Cammeyer*, 1 Esp. 105; *Barry v. Lord Barrymore*, 1 Sch. & L. 28, cit.; *Clinan v. Cooke*, 1 Sch. & L. 22; *Emmerson v. Heelis*, 2 Taunt. 38.

(6) In *Watkins v. Vince*, (2 Stark. 368,) the plaintiff brought an action against the defendant upon a guarantee. It appeared in evidence that the guarantee was in the handwriting of the defendant's son, a youth of the age of sixteen years, and who was proved to have occasionally signed his father's name, and in three or four instances to have accepted bills for him. It does not appear that any evidence was given to show that the youth had upon any previous occasion signed a guarantee in his father's name, or that if he had authority to accept bills, he had any authority to guarantee (the one authority not being necessarily included in the other), and yet Lord Ellenborough held, that there was a sufficient *prima facie* evidence in the absence of any inducement on the part of the son to commit a crime, to warrant the reading of an instrument purporting to be a guarantee by the father, in the handwriting of the son.

so as to charge the principal, may be made out by parol evidence (*b*). And although there may not have been a previous authority, a subsequent sanction or ratification of the act of the agent by the principal, will be sufficient to charge the principal (*c*), of which parol evidence may also be given (*d*). But in order to fix the principal by the act of the agent, the authority must be strictly pursued (*e*) (3); *a fortiori*, if an agent, at the time he signed a guarantee, should declare that he had not authority on the part of his principal to sign the guarantee in question, the principal would not be bound (*f*).

Nor will the principal be bound by the act of the agent, where the agent guarantees on behalf of the

(*b*) *Wilson v. Hart*, 7 Taunt. 295.

(*c*) *Maclean v. Dunn*, 4 Bing. 722; *S. C.* 1 Moo. & P. 76.

(*d*) *Maclean v. Dunn*, *supra*.

(*e*) *Co. Litt.* 112 b. 181 b.; *Com. Dig.* tit. Attorney, c. 11; 3 *Vin. Abr.* 419, pl. 7.

(*f*) *Howard v. Braithwaite*, 1 Ves. & B. 202.

(7) The law upon this point seems to be carried to an extreme length. It is laid down in *Co. Litt.* 181 b. "If a charter of feoffment be made, and a letter of attorney to four or three jointly or severally, to deliver seisin, two of them cannot make livery, because it is neither by them four or three jointly, nor any of them severally." And in 3 *Vin. Abr.* 419, pl. 7, "If a letter of attorney to make a livery of seisin *conjunctim et divisim* be made to three, and two of them make livery, the third being absent, this is not good, for this is not *conjunctim* nor *divisim*." In *Guthrie v. Armstrong*, (5 B. & Ald. 628,) a power of attorney had been signed by the defendant constituting fifteen persons therein-named, his true and lawful attorneys jointly and separately for him, and in his name to sign and underwrite all such policies of insurance, as they, his said attorneys, or any of them, should jointly and separately think proper. The policy was executed for the defendant by four of the persons named in the power of attorney, and the question was, whether the execution of the power by such four persons was sufficient? Abbott, C. J., in delivering the judgment of the Court, admitted the law of the present day to be as stated in *Co. Litt.*, and in *Vin.*, but held, that inasmuch as the power was given to the fifteen persons jointly and severally, or any of them, the true construction was, that the power was given to all, or any of them, to sign such policies as all, or any of them, should think proper, and that the latter words controlled the meaning of the former, and rendered the execution of the power good.

principal by an instrument under seal, if the agent has not authority to do so by an instrument under seal (*g*) ; for it is a rule of law, that the delegation of authority to do an act by deed cannot be executed, unless there is an authority of as high a nature. And although the principal may have authorized an agent to guarantee on his behalf, it is in the power of the principal to revoke that authority at any time before a collateral engagement is entered into by the agent according to the Statute, notwithstanding the agent has previously promised *verbally* to give a guarantee, and the person to whom it was to have been given has acted upon the faith of the promise so made to him by the agent (*h*).

(*g*) *Harrison v. Jackson*, 7 T. R. 207 ; and see *Elliot v. Davis*, 2 Bos. & P. 338.

(*h*) See *Farmer v. Robinson*, 2 Camp. 339 n.

PART II.

OF THE CREDITOR, OR PARTY TO WHOM THE INSTRUMENT OF SURETYSHIP IS GIVEN.

CHAPTER I.

OF THE RIGHTS AND REMEDIES OF THE CREDITOR,
WITH RELATION TO THE SURETY.

I. Where the surety is solvent. II. Where the surety is bankrupt, or insolvent.

I. Where the surety is solvent.

Upon the default of the principal, the creditor has a remedy against the surety by action at law. If the contract of the principal and surety is several (*a*), or joint and several (*b*), and the duty or obligation to be performed or done by the principal, and the time limited for its performance, are certain, the creditor may proceed immediately against the surety, without first proceeding against, or (as it would seem) making application to, the principal; and neither notice of non-performance by the principal, nor demand on the surety, seems necessary to be averred or proved (*c*); for a surety is bound to inquire and inform himself, whether or not the principal has performed the engagement which the

(*a*) *Lee v. Nizon*, 1 Ad. & Ell. 201.

(*b*) *Weston v. Barton*, 4 Taunt. 673.

(*c*) *Atkinson v. Carter*, 2 Chit.

403; *Nares v. Rowles*, 14 East, 511; and see *Philips v. Sackford*, Cro. Eliz. 455; and the observations of Wood, B., in *Lilley v. Hewitt*, 11 Price, 494.

surety undertook he should perform. And if the contract is joint, as well as several, the creditor may sue the parties jointly (*d*). But if he elects to sue them jointly, he cannot sue them severally (*e*), for the pendency of one suit may be pleaded in abatement of the other.

So if there are several sureties, he may go against any one of them (*f*); nor after having released or compounded with one or more of the co-sureties, will the creditor be precluded from proceeding against the others; (except in the cases after-mentioned, where by operation of law the release of one of two or more joint, or joint and several contractors, operate at law as a release to all;) but the creditor cannot recover from the surety or sureties proceeded against, more than the proportion which he or they would have paid, supposing the surety or sureties released or compounded with, had contributed their respective shares (*g*).

But if there is any condition precedent to any liability to be incurred by the surety, that condition must be strictly performed; thus, if the surety engages that his principal shall, from time to time, *when required so to do by the creditor*, duly account for all monies received by him, and that he shall pay any balance that may be due from him, the creditor cannot compel the surety to pay any thing without proceeding to take the account; for a surety is bound only according to the terms of his contract, and has a right as against the party to whom the instrument of suretyship is given, to have

(*d*) See the observations of Buller, J., in *Streetfield v. Halliday*, 3 T. R. 779.

(*e*) See the observation of Lord Talbot, C., in *ex parte Rowlandson*, 3 P. Wms. 405.

(*f*) *Deering v. the Earl of Win-*

chelsea, 2 Bos. & P. 270; *S. C.* 1 Cox, 318; *Morgan v. Seymour*, 1 Ch. Rep. 120; *Greerside v. Benson*, 3 Atk. 253.

(*g*) *Ex parte Gifford*, 6 Ves. 805.

the terms of that contract strictly performed (*h*). So if the surety engages to pay the debt of his principal at a subsequent day, if not then paid by the principal, *the same being reasonably requested of him*, a request by the creditor is necessary, in order to make the surety liable, as there is no duty before request (*i*). So if negotiations are entered into between the creditor and the principal, with the sanction of the surety, for the payment of the debt of the principal by instalments, or otherwise, as may be agreed upon between the creditor and the principal; though the surety continues liable if the negotiations fail to take effect, there is an implied condition on the part of the creditor, that the surety shall not be proceeded against until he has received notice that those negotiations are at an end, and that the debt remains unsatisfied (*j*). So where S. entered into a bond conditioned for the payment to C. of such a sum of money as C. should recover in an action against P. in pursuance of the *statute of the 4th of Geo. 3, chap. 33*, and C. obtained judgment in that action, and put the bond in suit against S.: it was held, that S. might plead in bar to the action, that a writ of error was depending on the judgment against C.; for while the writ of error was depending, the money was not actually recovered (*k*). So where before the execution of a composition-deed, it was agreed, in the presence of the surety for the payment of the composition, that it should be void unless all the creditors executed it, and the surety

(*h*) See *Antrobus v. Davidson*, 3 Meriv. 569; *Elworthy v. Mauder*, 2 Moo. & P. 482; *S. C.* 5 Bing. 295; *Pearce v. Morrice*, 2 Ad. & Ell. 84; *ex parte Fairlie*, Mont. 17; *Holl v. Hadley*, 2 Ad. & Ell. 758; *Musket v. Rogers*, 5 Bing. N. C. 728.

(*i*) *Alcock v. Blowfield*, Noy, 95.

(*j*) See *Clift v. Gye*, 9 B. & Cress. 422; *Charlton v. Morris*, 6 Bing. 427; *Surman v. Bruce*, 10 Bing. 434.

(*k*) *Curling v. Innes*, 2 H. Blk. 372.

at the same interview afterwards executed the deed in the ordinary way, without saying any thing at the time of execution, and the deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors: it was held, that the subsequent delivery of the deed by the surety was conditional, and that the condition previously expressed, although not introduced into the act of delivery, was sufficient to make the deed operate as an escrow only until all the creditors signed it; and as all the creditors had not executed the deed, the surety was not bound (1). In a case, however, where the defendant had levied execution against his son to the extent of 1,000*l.* and upwards, and the plaintiff, (who was also a creditor of the son to a considerable amount, and held securities for his debt,) alleged that the defendant's son had committed an act of bankruptcy, and that the plaintiff was in a condition to set aside the execution, and the defendant, with the view to prevent a commission being issued out against his son, which might override his execution, guaranteed the payment to the plaintiff of all sums of money as were then due from the defendant's son to the plaintiff not exceeding 600*l.*, provided that, before the plaintiff should call on the defendant in pursuance of that guarantee, the plaintiff should *avail himself to the utmost* of any actual and *bona fide* security, lien, or deposit, by him held of the son, not including accommodation bills: it was held, that the plaintiff was not bound, by the terms of the guarantee, to commence an action against the acceptor of a bill of exchange, (which was in the plaintiff's hands at the time he received the guarantee, and of which bill the son was the drawer,) where the acceptor was, when the bill became due, insolvent, and in

(1) *Johnson v. Baker*, 4 B. & Ald. 440.

prison, and who had from that time, until action brought by the plaintiff upon his guarantee, remained, and was then, in prison (*m*).

A surety who has made himself liable to pay all sums advanced to his principal, will not be liable for monies illegally supplied to the principal; thus, if a banker advances money to his customer by honouring his drafts, which are not stamped according to the provisions of the Stamp Act (*n*), and in respect of which transactions the act of Parliament has declared no debt whatever shall arise; the money so supplied by the banker to his customer cannot be recovered from the surety, though the surety is under an obligation to the banker to repay him all monies supplied to his customer (*o*). But if a party guarantees the fulfilment of a contract in contemplation of a licence being procured, which contract, if no licence were procured, would be illegal, and a licence is subsequently procured, legalizing the contract, the guarantee is thereby made good (*p*). And where a trade was carried on in violation of the excise laws by the creditor, the carrying on of which was prohibited under a penalty: it was held, not to be such an illegality as to deprive the owner of the goods, who had sold them to another, of his right to recover the price against the surety, upon nonpayment by the principal; the object of the act of Parliament, which subjected the party to a penalty on commission of the act prohibited, not being for the protection of the public, but only to benefit the revenue (*q*).

A creditor is entitled to the benefit of all securities the principal debtor has given to his surety, as well as those which were given to the creditor by

(*m*) *Musket v. Rogers*, 5 Bing. N. C. 728.

(*n*) 55 Geo. 3, cap. 184, s. 13.

(*o*) *Swan v. the Bank of Scotland*, 10 Bli. N. S. 627; S. C. 2

Mont. & Ay. 656; S. C. 1 Deac. 746.

(*p*) *Timson v. Merac*, 9 East, 35.

(*q*) *Brown v. Duncan*, 10 B. & Cress. 93.

the principal (*r*); and if the creditor has the security of a pledge, or fund, in addition to the personal responsibility of the principal and surety, the creditor may proceed against the surety personally, without resorting in the first instance to the fund or pledge (*s*); and it is no defence to an action at law against the surety, upon his personal security, that a fund has been provided for the debt of the principal, to which the creditor may resort for payment; though upon payment by the surety to the creditor of the debt of the principal, or on its being secured, the creditor will be compelled to proceed against the fund or pledge for the surety's benefit (*t*).

Where an action was brought against the surety on a bond, conditioned for the performance of the covenants in a lease, in which was a proviso, that if the rent should be in arrear a certain time, whether demanded or not, the lease should be null and void; and the lessee purposely suffered the rent to be in arrear beyond the time, and then paid it, and afterwards finding that his lease was a disadvantageous one, gave a regular notice to quit, contending that his lease had become void, and that he was tenant from year to year only: the Court of King's Bench held, that the lease was voidable only, and had been set up again by the subsequent payment of rent, and therefore that the defendant, although merely a surety, was liable for breaches of covenant committed by the lessee subsequently to the expiration of the notice to quit (*u*).

(*r*) *Maure v. Harrison*, 1 Eq. Ca. Ab. 93; and see the observations of Sir William Grant, M. R., in *Wright v. Morley*, 11 Ves. 12.

(*s*) See *Folliott v. Ogden*, 1 H. Blk. 123; and Lord Eldon's judgment in *Wright v. Simpson*, 6 Ves.

714; but see *Wright v. Nutt*, 3 Bro. C. C. 326; *S. C.* 1 H. Blk. 136.

(*t*) See Lord Eldon's observations in *Wright v. Simpson*, *supra*.

(*u*) *Read v. Farr*, 1 Saund. 287 d. n. (q), 5th ed.

In cases of fraud (*v*), accident (*w*), or mistake (*x*), equity will, it seems, relieve, as well against the surety, as against the principal. If the instrument, upon which the liability of the surety arises, is a bond for the payment of money, and the same happens to have been lost (*y*), equity will, if any money is due upon the bond (*z*), set up the debt against the surety, though the principal may be out of the jurisdiction (*a*); requiring, however, for the surety's protection, that the obligee give him a proper and effectual indemnity against all claims and demands, costs, and expenses, consequential upon its loss.

A strong case, however, must (it would seem) be made to extend the liability of the surety (who derives no benefit from the transaction) beyond the legal obligation of the instrument by which he has bound himself, and to show that the instrument was intended to be other than what it is (*b*). Where a *joint* promissory note was made by A., B. and S., and S. was described upon the note as "surety," Lord Eldon considered the creditor, after S.'s decease, had no claim against S.'s assets, (S. having died in the lifetime of A. and B.) there being no ground for assuming that the intention of the par-

(*v*) See *Brown v. Savage*, Rep. temp. Finch, 184; and the observation of Lord Hardwicke, C., in *Skip v. Edwards*, 9 Mod. 438.

(*w*) See the observation of Lord Hardwicke, C., in *Skip v. Edwards*, *supra*; *the East India Company v. Boddam*, 9 Ves. 464; *Underwood v. Stoney*, 1 Ch. Ca. 77.

(*x*) *Crosby v. Middleton*, 3 Ch. Rep. 55; S. C. Pre. Ch. 309; S. C. 2 Eq. Ca. Ab. 188; *Speering v. Lynn*, Pre. Ch. 115; S. C. 2 Vern. 376; and see *Rawstone v. Parr*, 3 Russ. 424 & 539; *ex parte*

Symonds, 1 Cox, 200; and the observation of Lord Hardwicke, C., in *Skip v. Huey*, 3 Atk. 91.

(*y*) *The East India Company v. Boddam*, *supra*; *Underwood v. Stoney*, *supra*; *Sheffield v. Lord Castleton*, 1 Eq. Ca. Ab. 93.

(*z*) *Underwood v. Stoney*, *supra*; *ex parte Symonds*, *supra*.

(*a*) *The East India Company v. Boddam*, *supra*.

(*b*) *Rawstone v. Parr*, 3 Russ. 424, 539; *Wright v. Russell*, 2 Blk. 934; S. C. 3 Wils. 530; *Simpson v. Field*, 2 Ch. Ca. 22.

ties would be carried into effect, by making the note several, as well as joint (c) (1).

Where a person signed and sealed a bond as surety for his principal, but by mistake of the clerk who drew the bond, the surety's name was not inserted in it, equity would not permit the surety to avail himself of that circumstance, but held him liable to the obligation by his signing and sealing (d). So in furtherance of the obvious intent of the parties, even a blank may be supplied (e) (2); or, if a word is introduced into the instrument which has no meaning, it shall not vitiate the instrument, but an averment will, even in a court of law, be admitted to correct the defect (f). But if the word has a meaning, it cannot be averred *at*

(c) *Rawstone v. Parr*, 3 Russ. 539, overruling the judgment of Sir John Leach, M.R., in *S. C.*, 3 Russ. 424.

(d) *Crosby v. Middleton*, 3 Ch. Rep. 55; *S. C. Pre. Ch.* 309; *S. C. 2 Eq. Ca. Ab.* 188; and see

Longden v. Goole, 3 Lev. 21.

(e) *Coles v. Hulme*, 8 B. & Cress. 568.

(f) *Anon.* 2 Freem. 16; *Simms v. Barry*, Rep. temp. Finch, 413; *S. C. nom. Sims v. Urry*, 2 Ch. Ca. 225.

(1) No case has hitherto occurred, which the author has been able to discover, where equity has varied the legal effect of the instrument so as to charge the surety.

In those cases where an instrument, which in its form was joint, has been made joint and several, the parties have participated in the consideration. (*Bishop v. Church*, 2 Ves. 100, 371; *Simpson v. Vaughan*, 2 Atk. 31; *Thomas v. Frazer*, 3 Ves. 399; *Burn v. Burn*, 3 Ves. 573; and see the observations of Sir Wm. Grant, M. R., in *Sumner v. Powell*, 2 Meriv. 30.) In *Wright v. Russell*, (3 Wils. 530,) the Court observed, that "courts of equity are favourable to sureties, for where they are not strictly bound at law, a court of equity will not bind them;" and in *Simpson v. Field*, (2 Ch. Ca. 22,) it is stated, that "where a surety is not liable at law, he shall not be made liable in equity." It is submitted, however, that these opinions must be taken with the above qualifications.

(2) A rather whimsical illustration may be given, of the respect the Court pays to the intention of the parties, in the following passage from *Hookes v. Swaine*, (1 Sid. 151)—"*Et Twisden, Justice, dit que il remember tiel nice case, quel fust que Sir William Fish fust obligé per obligation pur pay tiel jour, in Gray's Inn Hall, fifty pounds (sans dire de argent). Et pur ceo sur le jour quant les Gent' homes fueront al supper, il vient et tender fifty pounds weight de stone, et adjudge nul tender.*"

law, that it has a meaning other than that which is expressed upon the instrument.

A guarantee being a contract of indemnity, to make good the default of the party for whom the guarantee is given, is therefore not an *absolute debt*, but an engagement to pay what shall be found due from the principal, and until that fact is known, is in the nature of a claim for unliquidated damages, and not the subject of a set-off, within the *statute 2 Geo. 2, cap. 22 (g)*; consequently, if A. sues B. at law for a debt, and at the time of action brought, A. had become liable to B. under a guarantee in respect of monies advanced by B. at A.'s desire, to a third party, which monies the plaintiff, though he had been requested by the defendant to pay, had not paid; the demand of B. under the guarantee, being unliquidated and unascertained, is not a *debt*, within the meaning of the Statute, and cannot in that action be set off by B. against A.'s demand (*h*). So, on the other hand, if B. is the surety, and A. the party to whom the guarantee is given, and A. sues B. upon his guarantee, under which B. had become liable, B. cannot, if a sum of money is owing to him from A., set-off that sum against the demand made by A. against him upon the guarantee; for the Statute only applies to *mutual debts (i)*. But if it had been agreed between the party to whom the guarantee had been given, and the surety, that the surety shall pay in respect of his liability under the guarantee, a stipulated sum in the nature of liquidated damages, so that the intervention of a jury for the purpose of ascertaining the quantum of damages which the former party had sustained, is

(g) Sect. 13.

(h) *Morley v. Inglis*, 4 Bing. N. C. 58; *Crawford v. Stirling*, 4 Esp. 207; and see *Howlet v. Strickland*, Cowp. 56; *Weigall v. Waters*, 6 T. R. 488.

(i) *Sampson v. Burton*, 2 Brod. & B. 89; *S. C.* 4 J. B. Moo. 515; and see *Grant v. the Royal Exchange Assurance Company*, 5 M. & Sel. 439; *Hardcastle v. Netherwood*, 5 B. & Ald. 93.

unnecessary ; then it seems that the sum fixed upon and admitted as the specified amount of the surety's liability, may be considered as in the nature of an amount stated, and a set-off would be allowed (j.)

If the plaintiff in replevin be nonsuited for want of a plea in bar, the avowant may sue the sureties on the bond, and need not execute a writ of inquiry for his damages (k) ; but if the sureties have been relieved from their liability under the replevin bond, in consequence of the plaintiffs having obtained a verdict at law, the Court will not grant the defendant a new trial, even on payment of costs, without very clear grounds, for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, from which, by such verdict, they were exempt ; as the plaintiff might by another trial be called on to pay double costs (l).

If the defendant at law having given bail obtains the common injunction for want of an answer, the creditor cannot proceed against the bail without a breach of the injunction (m), for a proceeding against the bail must be treated as a proceeding against the party (3) ; but if the defendant has been taken on an attachment issued from the Court of Chancery for want of an answer, gives the usual bail bond to the sheriff, and still refuses to answer, the plaintiff may, at the same time, proceed to

(j) See *Wienholt v. Roberts*, 2 Camp. 586 ; *Thorpe v. Thorpe*, 3 B. & Ad. 580 ; *Fletcher v. Dyche*, 2 T. R. 32 ; and the observation of Tindal, C. J., in *Morley v. Inghis*, 4 Bing. N. C. 58.

(k) *Waterman v. Yea*, 2 Wils. 41.

(l) *Parry v. Duncan*, 7 Bing. 243.

(m) *Leonard v. Attwell*, 17 Ves. 385 ; *Stone v. Tuffin*, Ambl. 32.

(3) And so *conversely*, if a bill in equity has been brought by the principal debtor against the creditor for an injunction, to restrain the latter from proceeding at law, and which bill is dismissed, the bail cannot bring another bill, taking up the same equity, unless there is collusion between the creditor and the principal. (*Anon.* 2 Ves. 630.)

enforce an answer by the process of the Court, and bring an action against him and his sureties on the bond given to the sheriffs under the attachment (*n*); for the sureties have no right to appear, except through their principal, who, being in contempt, could not himself have appeared, and the giving of a bail bond would be quite useless, if no proceedings could be taken on it (*o*).

Where, on the dissolution of partnership between P. and C., the stock in trade, book debts, &c. were assigned to P. in consideration of a sum of money to be paid by instalments, to secure which, P. and S., as her surety, gave their joint and several bonds to C., and a warrant of attorney to enter up judgment against them as on a *mutuatus*, and judgment was accordingly entered up against P. and S. jointly, and the last instalment of the money secured having become due, P. filed her bill in equity against C., alleging errors in the amount of the debts, and praying an account, an abatement out of the instalment, and an injunction to stay legal proceedings against the plaintiff, but to which bill S. was not a party; a proceeding by C. against S. on the judgment, after the common injunction for want of an answer had been obtained by the plaintiff, was held not to be a breach of the injunction; the surety obligor not being entitled to the injunction, when he is not a party to the suit (*p*).

Where the plaintiff, against whom a writ of *ne exeat regno* had issued, had gone abroad after entering into the usual bond with sureties, Lord Eldon, C., upon the application of the creditor, ordered the sureties to pay into Court the sum for which the writ was marked, within six months,

(*n*) *Beddell v. Page*, 2 Sim. 224.

supra.

(*o*) *Beddell v. Page*, *supra*; and see the observations of Lord Hardwicke, C., in *Stone v. Tuffin*,

(*p*) *Chaplin v. Cooper*, 1 Ves. & B. 16.

together with the costs of the application (*q*); although it was suggested on behalf of the sureties, that the money claimed by the party making the application was on account, and not then proved to be actually due, and that the principal had put in his answer, which had not been excepted to, and had gone abroad under a mistake as to the effect of his bond, the condition whereof he presumed to be satisfied by the putting in of his answer (*r*).

It is said (*s*), that the creditor is not entitled to recover against the surety, the costs of a fruitless suit against the debtor, unless he give the surety notice of his intention to sue.

If the principal has become bankrupt, the creditor may prove under the commission, or may resort to the surety without proving under the commission, unless the creditor is an annuity creditor, and the bankrupt is the grantor of the annuity, in which case, the value of the annuity must be ascertained by the commissioners (*t*); and this, notwithstanding the annuity was granted previously to the passing of the 6 Geo. 4, cap. 16 (*u*); and the creditor cannot sue the surety until he shall have proved for the value of the annuity (*v*); or even take out execution against the surety, where judgment had been entered upon a warrant of attorney, issued out against the bankrupt, the grantor of the annuity, and his surety, previously to the passing of the 6 Geo. 4, cap. 16 (*w*); for by the 55th section of this act, it is required that the value of the annuity be

(*q*) *Utten v. Utten*, 1 Meriv. 51; and see *Musgrave v. Meden*, 1 Meriv. 49.

(*r*) *Utten v. Utten*, *supra*.

(*s*) *Per Best, J.*, in *Baker v. Garratt*, 3 Bing. 56.

(*t*) 6 Geo. 4, cap. 16, s. 54; and see *ex parte Parton*, 2 Deac. 62; S. C. 3 Mont. & Ay. 5.

(*u*) *Bell v. Bilton*, 4 Bing. 615; S. C. 1 Moo. & P. 574.

(*v*) 6 Geo. 4, cap. 16, s. 55; *Bell v. Bilton*, *supra*; and see the observation of Alderson, B., in *Maber v. Hobbs*, 2 You. & Coll. 317.

(*w*) *Hone v. Morgan*, 4 Man. & Ry. 559.

ascertained before the annuity creditor sue the surety, and the suing out of execution is equivalent to a suit.

But the Insolvent Debtors' Act (*x*) contains no provision similar to the 55th section of the Bankrupt Act, and the grantee of an annuity may, upon the insolvency of the grantor, immediately resort to the surety (*y*), though the effect of such proceedings would be, that by a circuit of action, the insolvent would remain liable in respect of the annuity, notwithstanding he procures his discharge under the Insolvent Act (*z*).

If the surety, upon the bankruptcy of the principal debtor, think proper to contest the question of his liability with the creditor, and allow the creditor to go in under the commission of bankrupt issued against the principal debtor, and the creditor prove his debt, the creditor is entitled to sign the bankrupt's certificate of conformity, notwithstanding he receive notice from the surety not to do so (*a*); for it is the duty of the surety to pay the debt, and if he declines so doing, and thereby permits the creditor to prove, the signing of the certificate of conformity, (which is a power given by the Statute to the proving creditor,) is a moral obligation on the creditor, and which the creditor is morally bound to exercise, where the creditor is placed in the condition to exercise it by the laches of the surety, and where the creditor is satisfied that the bankrupt has conformed to the provisions of the Statute; but if the creditor has been fully paid by the surety, the creditor will, upon the

(*x*) 7 Geo. 4, cap. 57.

(*y*) *Hocken v. Browne*, 4 Bing. 400; *Abbott v. Bruere*, 5 Bing. N. C. 598.

(*z*) See *post*, "Of the Rights and Remedies of the Surety, with

relation to the Principal: after Payment; where the Principal is Insolvent."

(*a*) *Browne v. Carr*, 7 Bing. 508; S. C. 2 Russ. 600.

application of the surety, be restrained from signing the certificate, where he has not signed it (*b*); and if the creditor has signed it, when he has been desired by the surety not to do so, his name will be directed to be erased from the certificate (*c*); for after payment and notice, the signing of the certificate is an important act of administration, as to the property, concerning which the creditor has no further interest; and the consequence of it being to release the person of the principal debtor from the arrest of the surety, and his future effects from execution.

Where a bond is given by the principal and his surety, conditioned for the payment of a sum of money by instalments, and the obligee proves for the whole debt under the fiat of the principal, and receives a dividend on the amount of such debt, the creditor is entitled to recover from the surety the several instalments as they become due, making a deduction in each instalment proportionate to the dividend, and the surety is not entitled to have the whole dividend applied in discharge of the instalments as they severally become due, to the extent of the dividend received, but only rateably, in part payment of each instalment, as it becomes due (*d*).

The sureties for a receiver are answerable for all monies whether in respect of principal or interest, as the receiver himself was liable to pay; but in a case where the receiver had been bankrupt, with the knowledge of all parties, for a considerable length of time, and no steps had been taken to compel the passing of his accounts, Lord Eldon refused to make the sureties pay interest (*e*).

(*b*) *Ratcliffe v. Gunson*, 6 Madd. 193; and see *ex parte Herbert*, 2 Glyn & Ja. 66; *ex parte Taylor*, 1 Glyn & Ja. 399.

(*c*) See *ex parte Herbert*, *supra*.

(*d*) *Martin v. Brecknell*, 2 M. & Sel. 39.

(*e*) *Dawson v. Raynes*, 2 Russ. 466.

Although a lessee who becomes bankrupt before the expiration of his lease, is discharged from his obligations under the lease, by virtue of the 75th section of the late Bankrupt Act (*f*); yet a surety who has joined in the lease with the lessee (*g*), or who has entered into a bond with the lessee to the landlord, for the performance of the covenants contained in the lease (*h*), continues liable to the landlord for breaches of covenant occurring after the date of the *fiat*; there being nothing in the act to extend the defeazance to his case, and the object of the act being to discharge the bankrupt from his obligations, but not to disturb the claims of creditors on other persons, as sureties, from the failure of such debtors or bankrupts.

In a case where the official assignee of the bankrupt's estate became insolvent, having money in his hands due from the bankrupt's estate, the Court of Bankruptcy permitted the creditor's assignee to use the name of the chief registrars in suing the sureties upon the bond, upon giving them a proper indemnity (*i*).

The creditor has a right to make all his securities available, with the view to the complete liquidation of his demand (*j*); and where the principal has deposited with the creditor a bill of exchange, or promissory note, as a security for his debt, which the debtor has not indorsed, the Court of Bankruptcy will, on the bankruptcy of the depositor, and upon the petition of the creditor, order the assignees of the debtor to indorse the same, in order to enable the creditor to bring an action at

(*f*) 6 Geo. 4, cap. 16.

(*g*) *Tuck v. Fyson*, 6 Bing. 321.

(*h*) *Inglis v. Macdougall*, 1 J. B. Moo. 196.

(*i*) *Ex parte Topham*, 1 Deac. 192; *S. C.* 2 Mont. & Ay. 484.

(*j*) *Ex parte Sammon*, 1 Deac.

& Ch. 564; *S. C.* 1 Mont. 264;

ex parte Wildman, 1 Atk. 109;

ex parte Parr, 18 Ves. 65; *S. C.*

1 Rose, 76; *ex parte Bennett*, 2

Atk. 527; and see in the matter of *Westzinthus*, 5 B. & Ad. 817.

law thereon, he undertaking not to bring an action or suit at law or in equity thereon, against the bankrupt debtor or his assignees (*k*).

But the right of the creditor to his securities may be qualified by the contract of the parties; thus, if C. agrees with D. to advance him 1,000*l.*, upon receiving negotiable securities to that amount, and D. deposits with C. securities to the amount of 3,000*l.*, and C. afterwards advances D. money to the latter amount, and among the securities deposited by D. with C., is an accommodation bill accepted by S. for 500*l.*, S. will not be liable to the creditor in respect of his accommodation bill, if the remaining securities in the hands of C. are sufficient to realize the sum of 1,000*l.*, to secure which amount was the specified purpose of the deposit (*l*); and upon payment by S. to C. of that sum, S. has a right to a transfer of those securities; or, should D. become bankrupt, S. has an equitable right to have the securities realized, and the proceeds applied to the liquidation of the 1,000*l.*, and will be held responsible to C. only for the unsatisfied balance, not exceeding the amount of his bill (*m*). If, however, the securities had been deposited with C. to secure any general balance owing to him from D., then C. would be entitled to claim from S. the full amount of his note (*n*), unless C.'s debt had been reduced by payments received from P. or his estate, so as to reduce the debt of C. below the amount of S.'s note (*o*).

So if the surety be liable to the creditor to a

(*k*) *Praed v. Gardiner*, 2 Cox, 86.

(*l*) See *Vanderzee v. Willis*, 3 Bro. C. C. 21; *Paley v. Field*, 12 Ves. 435; *ex parte Vere*, 2 Mont. & Ay. 123; S. C. 4 Deac. & Ch. 295.

(*m*) *Ex parte Vere*, 2 Mont. & Ay. 123; S. C. 4 Deac. & Ch.

295; *ex parte Brook and Chatteris*, 2 Rose, 334.

(*n*) *Ex parte Sammon*, 1 Deac. & Ch. 564; and see the judgment of Erskine, C. J., in *ex parte Vere*, *supra*; and see in the matter of *Westzinthus*, 5 B. & Ad. 817.

(*o*) *Ex parte Sammon*, *supra*.

limited amount only, and the creditor gives credit to the principal debtor in a sum beyond that for which the surety engaged to be answerable, and a *fiat* in bankruptcy issues against the principal debtor, and the creditor goes in under the principal's bankruptcy, and receives dividends in respect of his whole demand, the dividends so received by the creditor under the bankruptcy of the principal debtor, shall go in reduction as well in respect of the sum for which the surety is liable, as the excess beyond that sum for which the surety is not liable, and the creditor will not be allowed to apply the dividends so received by him in reduction of that part of his demand for which the surety is not answerable, to the prejudice of those rights which the surety would have had, if the amount had been the same as the amount of the surety's liability; but the dividends must be applied rateably upon the whole debt, as well upon that part for which the surety had engaged to be answerable, as upon that part which the creditor had advanced without security (*p*); thus, if P. and S. execute a joint bond to C., to secure to C. the repayment of all monies advanced by C. to P., and the bond contains an express condition that S. shall not be liable to a larger amount than 1,000*l.*, and the creditor gives credit to P., the bankrupt, to the amount of 2,000*l.*, and a dividend of 10*s.* in the pound is received by C. under the commission issued against P., a moiety of the money so received by C. shall be considered to have been received in respect of the 1,000*l.* for which the surety was liable, and consequently C. will only be entitled to recover against S. the sum of 500*l.* (*q*).

An assignment by the principal of his effects to

(*p*) *Ex parte Turner*, 3 Ves. 243; *ex parte Rushforth*, 10 Ves. 409; *Payley v. Field*, 12 Ves. 435;

Bardwell v. Lydall, 7 Bing. 489.

(*q*) *Ex parte Rushforth*, *supra*; *Payley v. Field*, *supra*.

trustees, for the benefit of his creditors, *pro ratâ*, is referable to the same principle, it being considered in the nature of a bankruptcy; and the dividends received by the creditor must be applied by him rateably to the whole debt, as well the part covered by the guarantee, as the part left uncovered by the guarantee; for the payment is not a payment in gross, but a payment specifically made by the trustees and received by the creditor, as so much in each and every pound of the whole amount of the debt (*r*).

II. Where the surety is bankrupt, or insolvent.

“ By the *statute 6 Geo. 4, chap. 16*, a bankrupt may be discharged from all debts due at the time of issuing the commission, all that are certain to become due at a future time, and all that may or may not become payable by the bankrupt at a future time: in the latter case, where the contingency has not happened before the issuing of the commission, the commissioners, on application from the party with whom the debt has been contracted, may ascertain its value, and admit the party to prove; or if the contingency has happened before the value is ascertained, the demand then stands as if it had been *debitum in præsentî solvendum in futuro*, and the creditor may prove in respect of such debt, and receive dividends, only not disturbing former ones” (*s*).

The word “*debt*,” which occurs in the 56th section of the *statute 6 Geo. 4, chap. 16* (4), and which

(*r*) *Bardwell v. Lydall, supra.* in *Yallop v. Ebers*, 1 B. & Ad. 698.
 (*s*) *Per Lord Tenterden, C. J.,*

(4) The 56th section is as follows: “ And be it enacted, That if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency, which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted, may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are

enables the creditor to prove in respect of debts contracted by the bankrupt payable upon a contingency, has been held not to be confined strictly to that for which *an action of debt* could be brought, but to extend to any transaction, claim, or demand, which in equity or at law might end in a debt^(t): the object of the legislature being, on the one hand, to assist the creditor by enabling him to prove in respect of all fair equitable undertakings which ought to be rendered available against the bankrupt's assets, and, on the other hand, to relieve the bankrupt from all his liabilities *(u)*.

In order, however, to render a contingent debt capable of being proved under the 56th section of the late Bankrupt Act, it must be such a contingent liability as can be considered a "*debt*" *existing when the fiat issues*, though the *payment* of that debt may depend upon a contingency *(v)*. And if in consequence of the complication of the events, or otherwise, the contingency cannot be then subjected to any known law of calculation, the difficulty can only be removed by the happening of the contingency or events, before the declaration of a final dividend, and before the bankrupt obtains his cer-

(t) *Ex parte Myers*, 1 Mont. & Bli. 229; *ex parte Tindal*, 8 Bing. 402; *S. C.* 1 Mont. 375; *S. C.* 1 Deac. & Ch. 291.

(u) See the observations of Erskine, C. J., in *ex parte Myers*, *supra*; of Best, C. J., in *Bell v. Bilton*, 4 Bing. 615; *S. C.* 1 Moo.

& P. 574; and of Abbott, C. J., in *Vansandau v. Corsbie*, 3 B. & Ald. 13.

(v) *Per Erskine*, C. J., in *ex parte Marshall*, 1 Mont. & Ay. 145; and see *the Skinners' Company v. Jones*, 3 Bing. N. C. 481.

hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

tificate, and the liability of the surety thereby become matured into a debt (*w*).

If a surety covenant to pay an annuity (*x*), or the premiums of an annual policy, (which has been assigned by the person on whose life the insurance had been effected (*y*),) in case default is made by the grantor of the annuity, or the assignor of the policy; or guarantees the payment of a bill of exchange, in case it shall not be paid when due by the acceptor, (otherwise than by indorsement (*z*);) or the payment of the debt of a third person, on a day certain, which has not elapsed (*a*); or upon notice given to the surety that it is unpaid (*b*); and the surety becomes bankrupt: default must be made by the grantor of the annuity, or the assignor of the policy, or the bill of exchange must have become due, or the day for the payment of the debt of such third person must have elapsed, or notice must have been given to the surety, to entitle a party to prove in virtue of the 56th section of the 6 Geo. 4, chap. 16; for until then, the surety's undertaking is a mere collateral liability depending on events incapable of valuation. But if there be a positive contract by the surety to pay at all events, without regard to the principal; as where a party appears upon the instrument to be substantially a joint grantor of an annuity (*c*), or a co-obligor in a bond (*d*), or a joint

(*w*) *Ex parte Myers*, 1 Mont. & Bli. 229; *ex parte Lewis*, 1 Mont. & Maca. 426; *ex parte Simpson*, 3 Deac. & Ch. 792; S. C. 1 Mont. & Ay. 541.

(*x*) *Ex parte Thompson*, Mont. & Bli. 219; S. C. 2 Deac. & Ch. 126; *Thompson v. Thompson*, 2 Bing. N. C. 168; *Johnston v. Compton*, 4 Sim. 37.

(*y*) *Atwood v. Partridge*, 12 J. Moo. 431; S. C. 4 Bing. 209.

(*z*) *Ex parte Harrison*, 2 Bro.

C. C. 614; S. C. 2 Cox, 172; *ex parte Gardom*, 15 Ves. 286; *ex parte Adney*, Cowp. 460; *ex parte MacMillan*, Buck. 287.

(*a*) *Alsop v. Price*, 1 Doug. 160.

(*b*) *Ex parte Minet*, 14 Ves. 190; *ex parte MacMillan*, *supra*; *ex parte Lewis*, Mont. & Maca. 426; *Hoffham v. Foudrinier*, 5 M. & Sel. 21.

(*c*) *Baxter v. Nichols*, 4 Taunt. 90.

(*d*) *Brooks v. Lloyd*, 1 T. R. 17.

maker of a note (e) : or where the party indorses (f), or draws (g), or gives his acceptance to (h) a bill of exchange, though he may be, as regards the other joint grantor of the annuity, or the parties to the note or bill of exchange, simply a surety (i) : then it is a debt that is immediately proveable under the surety's fiat. The grantee of an annuity, however, will not be allowed to prove the value of the annuity, under a *fiat* issued against a grantor in an annuity deed, though the deed contains a covenant from the bankrupt for payment of the annuity to the grantee, which is in its form absolute and unconditional, if it can be collected from the tenor of the whole contract, that it was the manifest intention of the parties that the bankrupt should only be responsible, as surety, upon default of the grantor (j).

If the surety, in addition to the guarantee given by him to the creditor, to be answerable for the value of goods supplied to the principal, indorse a bill of exchange in favour of the creditor, drawn by the creditor upon, and accepted by, the principal debtor, for the price of those goods, and the bill of exchange is not proved under the surety's bankruptcy, the creditor's demand under the guarantee will be barred by the surety's certificate; for the reason that the bill was indorsed in satisfaction of the guarantee (k).

In contracts for *indemnity* it has been held, that no "debt" is created until a loss has been actually incurred : upon which principle it was lately deter-

(e) *Ex parte Crosfield*, 2 Mont. & Ay. 543.

(f) See the observation of Erskine, C. J., in *ex parte Myers*, Mont. & Bli. 229.

(g) *Starey v. Barns*, 7 East, 435; *ex parte Douthat*, 4 B. & Ald. 67.

(h) *Stedman v. Martinnant*, 12 East, 664; *S. C.* 13 East, 427;

and see the observation of Lord Eldon, C., in *ex parte Minet*, 14 Ves. 190.

(i) *Baxter v. Nichols*, *supra*.

(j) *Ex parte Marks*, 3 Mont. & Ay. 521.

(k) *Gaskell v. Lindsay*, Holt, N. P. C. 212.

mined, in the case of *ex parte Marshall* (l), that the obligee in a bond of indemnity, *not forfeited before the issuing of the fiat*, was not entitled to prove under the bankruptcy of the obligor, in respect of liabilities which had been subsequently incurred; inasmuch as there was no "debt" existing at the time of the issuing of the *fiat*. If, however, the bond had been forfeited before the issuing of the *fiat*, though the obligee had not, at the date of the *fiat*, sustained any damage, then, it seems, a debt will be considered to have existed at the issuing of the *fiat*, although the amount to be paid depends upon an event then resting in contingency: the Court of Bankruptcy, in such a case, fixing upon the penalty as the nominal debt, upon which to fasten the equitable relief (m). And a forfeiture, if it has been incurred, is not cured at common law, in consequence of the principal's being at the time solvent, or from the creditor's receiving from the principal, subsequently to the forfeiture, payments on account of the bond; but the bond having been once forfeited, constitutes a debt proveable under the surety's bankruptcy, and, consequently, will be barred by his certificate (n).

The instalments of an annuity, for the payment of which a bankrupt is surety only, and which he covenants to pay in case of the default of the grantor, are not proveable under a *fiat* issued against the bankrupt's surety, where they become due after the surety's bankruptcy, though default should have been made by the grantor, and the estate of the bankrupt not have been exhausted (o); for the 54th section of the 6 Geo. 4, c. 16, which enables a creditor to prove under the bankrupt's *fiat* for the value of the annuity, applies only to the case where the grantor

(l) 3 Deac. & Ch. 120; S. C. 1 Mont. & Ay. 145.

(m) See *ex parte Marshall*, *supra*, and the cases there cited.

(n) *The Skinners' Company v. Jones*, 3 Bing. N. C. 481.

(o) *Thompson v. Thompson*, 2 Bing. N. C. 168.

of the annuity becomes bankrupt, and not to the surety; and under the 56th section of the same act, the instalments are not a debt, nor ever can become one from the surety, except in the event of the grantor's never paying, the value of which contingency it is impossible to calculate.

Where the debt to the creditor, for which the surety is liable, is absolute at the date of the *fiat*, the creditor may prove against the estate of the surety for all that is due to him from the principal (*o*); and if the principal have become bankrupt, as well as the surety, the creditor may prove under both *fiats* the amount of his debt, until he has thereby worked out the whole of the money due to him (*p*).

But if a dividend has been received by the creditor under the principal's *fiat*, or (as it would seem) if a dividend has been declared (*q*) before the creditor has proved his debt under the surety's *fiat*, the amount of the dividend must be deducted from the debt sought to be proved under the surety's *fiat*. However, in a case where C., with whom a bill of exchange drawn by D. upon, and accepted by, A., for D.'s accommodation, had been deposited by D. as a security for a debt owing from D. to C., and which bill was, upon the bankruptcy of D., proved by C. against D.'s estate, and thereby and by means of other securities deposited with C., C.'s debt was reduced to a small sum, and afterwards a commission issued against A.: C. was held to be entitled to prove under A.'s commission, not only for the balance upon the principal of the debt, but also for

(*o*) *Ex parte Rushforth*, 10 Ves. 409; *ex parte Marshall*, 1 Atk. 129; *ex parte Wildman*, 1 Atk. 109; *ex parte Simpson*, 3 Deac. & Ch. 792; *S. C.* 1 Mont. & Ay. 541.

(*p*) *Ex parte Powell*, 1 Deac. 378; *S. C.* 2 Mont. & Ay. 533; *ex parte Marshall*, *supra*; *ex parte*

Wildman, *supra*; *ex parte Rushforth*, *supra*; *ex parte Martin*, 2 Rose, 87.

(*q*) *Ex parte the Royal Bank of Scotland*, 2 Rose, 197; *S. C.* 19 Ves. 310; *ex parte Todd*, 2 Rose, 202, *in notis*; *ex parte Leers*, 6 Ves. 644.

the interest due upon the original debt from the date of the commission issued against D., up to the day on which the dividend was declared under A.'s bankruptcy (r).

So if there be several sureties, who are all bankrupts, proof may be made for the whole debt under each *fiat* (s). But the creditor shall not have more than "one satisfaction for his debt" (t).

Where a partnership is entered into between the principal and his surety, after a separate liability existed in both, in respect of goods sold to the principal when he was a separate trader, and a *fiat* issues against the principal and surety before the debt is discharged, the creditor has no right of proof against the joint estate of the firm, unless there was an express or implied agreement between *all the parties* that the joint liability of the firm should be substituted for the individual liability of the parties (u). And where the principal, in the names of himself and his partner, wrote a letter to the creditor, requesting his forbearance for a time, stating that he and his partner were about to dispose of their business, in order to discharge all their pecuniary engagements, and the creditor gave the required indulgence, but gave no answer to the letter; it was held, that such letter did not amount to a proposal on the part of the bankrupts, that the debt should be considered a joint debt; or even if it could be so considered, was there any assent to such proposal on the part of the creditor (v).

A surety may claim the benefit of any incident of which a surety is entitled to avail himself for his own relief; and upon the surety's bankruptcy, the same

(r) *Ex parte Martin*, 2 Rose, 87; and see *ex parte Reed and Aldrich*, 3 Deac. & Ch. 481.

(s) *Ex parte Leers*, 6 Ves. 644.

(t) *Per Lord Hardwicke*, C., in *ex parte Wildman*, 1 Atk. 109;

and see *ex parte Rushforth*, 10 Ves. 409.

(u) *Ex parte Hitchcock and Rogers*, 3 Deac. 507.

(v) *Ex parte Hitchcock and Rogers*, *supra*.

benefit attaches to his assignees. If the surety have become responsible to the creditor, through the default of the principal, and a subsequent arrangement is entered into between the creditor, principal, and surety, by which the creditor agrees to take from the principal a sum less than that which was originally due from him, and for which the surety was liable, and default is made in payment of the latter sum, in consequence of the bankruptcy of both principal and surety, the creditor will be allowed to prove under the *fiat* of the surety for the smaller sum only, the original contract of the surety not being revived by the failure of the second (*w*).

CHAPTER II.

OF THE RIGHTS AND REMEDIES OF THE CREDITOR WITH RELATION TO PERSONS CLAIMING UNDER THE SURETY.

THE devisee of a surety who had become responsible for the performance of covenants entered into by the lessee of land with his lessor, is not liable to an action of debt under the *statute 3 & 4 Will. 4, c. 14*, unless the relation of debtor and creditor existed between the lessor and devisor in the lifetime of both; thus, where lands were demised to P. for a term, determinable on the lessor's death, and S. as surety for the lessee, joined him in a covenant in the lease, whereby they jointly and severally covenanted for themselves and their heirs, that S. and P., or one of them, or their heirs, executors, or administrators, would pay the rent reserved, and

(*w*) *Ex parte Powell*, 1 Deac. 378; *S. C.* 2 Mont. & Ay. 533.

also a further rent as liquidated damages, if the land should be farmed contrary to the covenants of the lease ; and after S.'s death, rents of both kinds became due : it was held, that the surety's devisees were not liable for any of the sums due ; for the Statute was not meant to give creditors a remedy against devisees for the recovery of damages for breaches of covenants or contracts, made by their testators ; and although damages for the breaches of covenant declared on, were liquidated damages, and therefore in form might be sued for in an action of debt, they were not the less in substance damages (*x*).

As a party who receives an indemnity has no claim until he has been damnified, so neither can he, upon the insolvency of the party in respect of whose acts the indemnity had been given, call upon the representatives of the party who had given the indemnity, to set apart (by way of anticipation) a sum of money out of the assets of such last-mentioned party, to answer what might be found due from the principal on the settlement of accounts between him and the creditor (*y*).

Although the surety may, upon the bankruptcy of his principal, upon payment to the creditor of what is due to him from the bankrupt, restrain the creditor from signing the bankrupt's certificate of conformity (*z*), yet it would seem that an assignee of the debt from the surety, after the date of the *fiat*, has no such power to control the legal right of the creditor to sign the certificate, the equitable right of such assignee not having accrued until after the bankruptcy (*a*).

(*x*) *Farley v. Briant*, 3 Ad. & Ell. 839.

(*y*) *Antrobus v. Davidson*, 3 Meriv. 569.

(*z*) See *ante*, pp. 96 & 97.

(*a*) See *ex parte Herbert*, 2 Glyn & Ja. 66 ; *ex parte Taylor*, 1 Glyn & Ja. 399.

CHAPTER III.

OF THE RIGHTS AND REMEDIES OF THE CREDITOR,
WITH RELATION TO THE PRINCIPAL, WHERE
THERE IS A SURETY (*b*).

WHERE the creditor may maintain *assumpsit* against the principal, in respect of the debt due from him, a contract by the surety which is under seal, to which the principal is no party, does not by operation of law extinguish the simple contract debt of the principal (*c*).

A creditor has a right to avail himself of all *collateral* securities from third persons, to the extent of 20*s.* in the pound upon his actual debt (*d*) ; and if the principal is bankrupt, and the creditor has security in his hands from a surety, as a mortgage (*e*), or a bill of exchange bearing his acceptance (*f*), or a joint bond (*g*), or a joint promissory note (*h*) from the bankrupt, and a third person, (unless such bankrupt and the joint obligor in the bond, or the joint maker of the promissory note, are partners (*i*),) the creditor is not compelled to make that security available, but has a right to be admit-

(*b*) The rights and remedies of the creditor, with relation to the principal, are in part included under the title, "Of the Rights and Remedies of the Creditor with relation to the Surety." *Ante*, p. 84, *et seq.*

(*c*) See *White v. Cuyler*, 6 T. R. 176 ; S. C. 1 Esp. 200.

(*d*) *Ex parte Parr*, 18 Ves. 65 ;

S. C. 1 Rose, 76.

(*e*) *Ex parte Parr*, *supra*.

(*f*) *Ex parte Wildman*, 1 Atk. 109.

(*g*) *Ex parte Bennett*, 2 Atk. 527.

(*h*) *Ex parte Crosfield*, 2 Mont. & Ay. 543 ; S. C. 1 Deac. 405.

(*i*) *Ex parte Crosfield*, *supra*.

ted to prove against the estate of the principal for the whole amount of his debt, without deducting the value of the security; the deduction of a security never being made in bankruptcy, but when it is the property of the bankrupt.

Nor will a creditor be prevented from receiving dividends on the whole amount of his proof, provided he does not altogether receive more than 20s. in the pound, in a case where the surety, subsequently to such proof, makes the creditor a payment in reduction of his liability, if such payment by the surety falls short of the entirety of the debt, and is not accepted by the creditor in discharge of the entirety (j).

Where C., D. and E., who were partners in trade, and indebted to their bankers in the sum of 1,000l., being desirous of procuring from their bankers a further advance of money, entered into a joint and several bond to the bankers, in which S. joined as a surety, conditioned for the payment to the bankers of the sum of 5,000l. on demand, with interest from the date of the bond; and the surety having died, a suit was instituted by the bankers to administer his estate, under which it was found that it was the intention of the partners, the co-obligors in the bond, that the bond should be held by the bankers as a security for the general balance that should from time to time be due to them from the partners; and that it was the intention of the surety that the bond should be a security only for the particular balance due to the bankers at the date of the bond; and that the debt for which the surety had made himself responsible, had been discharged by payments made by the partners subsequently to the date of the bond, beyond the amount of the then

(j) *Ex parte Coplestone*, 3 Deac. 546.

existing debt; it was held upon the bankruptcy of the partners, that the bankers might prove the bond against the separate estate of C., for the whole amount of the principal and interest secured by it, there being due from the partners, at the time of their bankruptcy, a much larger sum than the sum secured by the bond (*k*).

(*k*) *Ex parte Walker*, 3 Deac. 672.

PART III.

OF THE SURETY.

CHAPTER I.

OF THE RIGHTS AND REMEDIES OF THE SURETY,
WITH RELATION TO THE CREDITOR.

A SURETY, upon payment to the creditor of the debt of the principal, is entitled to the benefit of all securities which the creditor has, and can render available against the principal debtor (*a*); and if any of those securities have been lost, or have become lessened in value, in consequence of the neglect or default of the creditor, the surety's liability to the creditor will be diminished to that extent (*b*). And the surety's right upon payment to a transfer of the securities will be the same, whether the surety

(*a*) *Parsons v. Briddock*, 2 Vern. 608; *S. C.* 1 Eq. Ca. Ab. 93; *Mayhew v. Crickett*, 2 Swanst. 185; *S. C.* 1 Wils. C. C. 418; *Praed v. Gardiner*, 2 Cox, 86; *Earl of Rosse v. Sterling*, 4 Dow, 442; *Beckett v. Micklethwaite*, 6 Madd. 199; *Capel v. Butler*, 2 Sim. & S. 457; *Lord Harborton v. Bennett*, 1 Beat. 386; and see *ex parte Rogers*, 4 Deac. & Ch. 623; *S. C.* 2 Mont. & Ay. 153; and the observations of Lord Brougham, C., in *Hodgson v. Shaw*, 3 Myl. & K. 183; of Sir

William Grant, M. R., in *Wright v. Morley*, 11 Ves. 12; of Lord Eldon, C., in *Copis v. Middleton*, T. & Russ. 224; and of Lord Hardwicke, C., in *ex parte Crisp*, 1 Atk. 133.

(*b*) The surety's right to be relieved, where the securities received by, or deposited with, the creditor, have been lost, or become lessened in value, through the creditor's neglect, will be considered in a subsequent part of this book. (See *post*, Chap. V. "Of the Surety's Discharge.")

knew of the existence of those securities or not (c); or whether the securities have been deposited by the principal with the creditor at the same, or at different times (d). However, it would seem, that to entitle the surety to avail himself of the securities which the creditor has, the securities must have been deposited (e), assigned (f), or made chargeable (g), in respect of the *same transaction* in which the surety became liable.

Where a husband was entitled, in right of his wife, to a sum of Bank Annuities standing in the names of trustees, the dividends of which he assigned to secure an annuity, but which Bank Annuities had not been reduced into possession, the Court of Chancery, upon a bill filed by the surety to have the fund made available for his indemnity, he having been called upon and made some payments in respect of the annuity, decreed that with regard to the payments the surety had actually made of the annuity, he was entitled to stand in the place of the creditor, and to be reimbursed out of the dividends; and that he had also an equity to have the fund applied in his exoneration: the dividends arising from the annuities being sufficient to keep down the annuity, besides affording a provision for the maintenance of the wife, who had been deserted by her husband (h).

Where a principal in a bond, being arrested, gave bail, and judgment was recovered against the bail, and the surety was afterwards called upon and paid the debt: it was held, that he was entitled to an assignment of the judgment against the bail; for

(c) *Mayhew v. Crickett*, 2 Swanst. 185; S. C. 1 Wils. C. C. 418; *Praed v. Gardiner*, 2 Cox, 86.

(d) *Parsons v. Briddock*, 2 Vern. 608; S. C. 1 Eq. Ca. Ab. 93.

(e) *Wade v. Coope*, 2 Sim. 155; and see Lord Eldon's observa-

tion in *ex parte Kendall*, 17 Ves. 514; S. C. 1 Rose, 71.

(f) *Wright v. Morley*, 11 Ves. 12.

(g) *Praed v. Gardiner*, 2 Cox, 86.

(h) *Wright v. Morley*, *supra*.

though the bail themselves were but sureties as between them and the principal debtor, yet, coming in the room of the principal debtor as to the creditor, it was held, that they likewise came in the room of the principal debtor as to the surety (*i*).

“But the rule” (which entitles the surety, upon paying off the debt of his principal, to call upon the creditor for a surrender of all the securities which he has belonging to the principal, for the purpose of obtaining his reimbursement), “must be qualified, by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor” (*j*); thus, if P. and S. are obligors in a bond, the one as principal, and the other as surety, and no other assurance is executed to the creditor, and the surety, upon being applied to by the obligee for payment, pays the money due upon the bond, the bond thereby becomes extinguished, and all remedy upon it is at an end (*k*); and an assignment of it to the surety, who pays it, is of no use (*l*), since even the principal might plead payment to an action brought against him in the name of the obligee (*m*), and consequently the surety cannot insist upon its assignment. So where the principal and surety gave to the creditor a joint and several promissory note, and the creditor brought separate actions against the principal and surety, and recovered judgment in both actions; and upon execution issued upon the judgment obtained against the surety, the surety paid the debt and costs: upon bill filed by the re-

(*i*) *Parsons v. Briddock*, 2 Vern. 608; *S. C.* 1 Eq. Ca. Ab. 93; see, however, the observations of Lord Brougham, C., upon Lord Cowper's decision in this case, in the former learned Lord's judgment in *Hodgson v. Shaw*, 3 Myl. & K. 189.

(*j*) *Per* Lord Eldon, C., in

Copis v. Middleton, T. & Russ. 224.

(*k*) *Gammon v. Stone*, 1 Ves. 339; *Woffington v. Sparks*, 2 Ves. 569; *Copis v. Middleton*, T. & Russ. 224.

(*l*) *Jones v. Davids*, 4 Russ. 277.

(*m*) *Woffington v. Sparks*, *supra*.

presentatives of the surety, for the purpose of obtaining an assignment of the judgment, which had been recovered against the principal debtor, it was held, that the creditor having been paid his debt, the judgment was satisfied, and the creditor would not have been permitted to have proceeded upon it at law against the principal; and it not being available at law in his hands, neither was it available in equity in the hands of the surety, and consequently that the surety could not compel an assignment of it (*n*). If, however, the principal debtor mortgages an estate to the creditor, as a collateral security for his debt, in addition to a bond given to the creditor by the principal, and to which the surety is a party, and the surety pays the creditor the money due on the bond, although the surety cannot call upon the creditor for an assignment of the bond, yet he has a right to stand in the place of the mortgagee, and to have the benefit of the mortgaged estate, which has not "got back" to the debtor, and which the surety may compel the creditor to assign to him (*o*).

A surety may, in equity, be entitled to that relief which he could not obtain in a court of law. If the creditor have both a personal remedy against the surety in respect of his demand, and also a fund to which he may resort for payment, and to which fund the surety, even upon payment to the creditor of what is due to him, cannot have access, a court of equity will, when it is satisfied that the creditor has the clear means of making his demand effectual against the fund, and upon the surety's indemnifying the creditor against the consequences of all risk, delay, and expense, compel the creditor to make the fund available towards satisfaction of his debt before he proceeds personally against the surety:

(*n*) *Dowbiggen v. Bourne*, 1 You. 111; *S. C.* 2 You. & Coll. 462. *Copis v. Middleton, T. & Russ.* 224.
(*o*) *Per Lord Eldon, C.*, in

upon the general principle of equity, that if a creditor have two funds to which he may resort for payment of his debt, he shall not by his will defeat another who has only one, but shall take to that, which paying him, shall leave another fund for another creditor (*p*). So if property belonging to the principal, and property belonging to the surety respectively, have been deposited with the creditor as a security for his debt, the surety, it would seem, may, in equity (upon submitting to pay to the creditor what shall be found to be justly due to him upon taking the accounts between him and the principal), insist upon the property of the principal being first applied in satisfaction of the creditor's debt (*q*).

Again—If the principal, in a proceeding by the creditor, could claim *in equity* a right of set-off, the surety is entitled to the same benefit, inasmuch as a proceeding against the surety is in effect a proceeding against the principal, who must indemnify the surety (1); thus, if a bill of exchange is drawn by D. upon A., which A. accepts for the accommodation of D., and D. discounts the bill with his bankers, who become bankrupts before its maturity, having in their hands at the time of their bankruptcy, the bill of exchange, and also a cash-balance of the drawer, the bill of exchange will be ordered to be given up in reduction of the cash-balance, leaving the drawer at liberty to prove for

(*p*) *Cottin v. Blane*, 2 Anstr. 544; and see the observations of Lord Eldon, C., in *Wright v. Simpson*, 6 Ves. 714; in *ex parte Kendall*, 17 Ves. 514; *S. C.* 1 Rose, 71; and in *Aldrich v. Cooper*, 8

Ves. 382; and of Lord Thurlow, C., in *Wright v. Nutt*, 3 Bro. C. C. 326.

(*q*) *Aguilar v. Aguilar*, 5 Madd. 414; *Clinton v. Hooper*, 1 Ves. jun. 173; *S. C.* 3 Bro. C. C. 201.

(1) A debt due from the creditor to the principal, cannot be made the subject of a set-off under the *stat. 2 Geo. 2, c. 22, s. 13*, in an action brought by the creditor against the surety upon the guarantee. (See *supra*, p. 92.)

the difference (*r*); for if an action had been brought against D., he would have had the benefit of a set-off, and he ought to have the same benefit if the action were brought against A., who being merely D.'s surety, would have to be repaid by D. (2).

If the creditor is the purchaser of an annuity, and a power is reserved to the grantor to re-purchase it upon certain terms, the surety has the same right, and may become the purchaser of the annuity upon the like terms (*s*); or, if from inadequacy of consideration (*t*), or from any other cause,

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| (<i>r</i>) <i>Ex parte Hippins</i> , 2 Glyn & Ja. 93; <i>ex parte Hanson</i> , 12 Ves. 346; <i>ex parte Stephens</i> , 11 Ves. 24; and see <i>Bolland v. Nash</i> , 8 B. & Cress. 105; <i>Collins v. Jones</i> , | 10 B. & Cress. 777.
(<i>s</i>) <i>Capel v. Butler</i> , 2 Sim. & S. 457.
(<i>t</i>) See <i>Underhill v. Horwood</i> , 10 Ves. 209. |
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(2) But if the bill so discounted had not been an acceptance for accommodation, D. who would then be the surety for its due payment by A., would not be allowed to set it off against the cash-balance in his bankers' hands (*ex parte Burton, Franco and Corea*, 1 Rose, 320); although it might happen, that in consequence of the bankruptcy of A. after the bankruptcy of the bankers, D. had been compelled to pay the bill, and thus had made it an existing debt as between him and the assignees of the bankers; for as between the bankers and D., there would not have been at the time of the bankruptcy *mutual debts*, nor had there been at any time between them *mutual credit*, for although D., by placing money in the bankers' hands, had given them credit, yet, on the other hand, the bankers, on discounting the bill, must be considered to have given credit to the acceptor of the bill, who was the person that ought to have paid it. (See *Hankey v. Smith*, 3 T. R. 507 n.)

And if there has been *mutual credit* once constituted between the parties, it is not in the power of one party by his own act, to put an end to the mutual credit originally constituted, so as to deprive the other of his right to set-off, in the event of the former's bankruptcy (per Lord Tenterden, C. J., in *Bolland v. Nash*, 8 B. & Cress. 105); as where A. is the indorser of a promissory note or bill of exchange, made or accepted by B., and which at the time of a commission of bankruptcy issued against B., is in the hands of a third party, inasmuch as credit is considered to have been given to the maker of a promissory note, or the acceptor of a bill of exchange, by every person who takes the note or bill (*Hankey v. Smith, supra*); A., by taking up the note or bill (though subsequently to the bankruptcy), is remitted to his former state, and may make it an item of set-off for his own debt, against the estate of B. (*Collins v. Jones*, 10 B. & Cress. 777; *contra ex parte Hale*, 3 Ves. 304.)

the principal may claim relief in a court of law or equity, in respect of the annuity, the same relief will be given to the surety.

Where the transaction between the parties is against public policy, equity will give the surety relief, though he himself was a party in the illegal transaction, the relief not being given for his sake, but for the sake of the public (*u*).

A surety is not entitled *in a court of law* to the inspection of a deed in the possession of the creditor, to which the surety is not a party, though by the deed time may have been given to the principal debtor which would operate to the surety's discharge; the surety not having that interest under the deed which a court of law deems sufficient to entitle him to its production (*v*).

If the surety, upon an action brought against him by the creditor upon the instrument of suretyship, pay money into court (*w*), or plead a tender (*x*), it is an admission of the contract declared on, and he cannot afterwards raise an objection as to the validity of the instrument, which otherwise might have been made by him.

If the surety allow a verdict to be had against him at law, where he had a legal defence, a court of equity will not (although it has a concurrent jurisdiction with the court of law), grant the surety relief unless he had also a defence in equity, of which he could not have availed himself in a court of law (*y*); and even where the surety's defence is *only in a court of equity*, yet, if he allow a verdict

(*u*) *Lord St. John v. Lady St. John*, 11 Ves. 526; and see the observation of Lord Eldon, C., in the *Vauxhall Bridge Company v. Spencer*, Jac. 64; and *Smith v. Bromley*, 2 Doug. 696 n.

(*v*) *Smith v. Winter*, 3 Mees. & Wels. 309.

(*w*) *Gutteridge v. Smith*, 2 H. Blk. 374.

(*x*) *Middleton v. Brewer, Peaks*, 15.

(*y*) *Greenside v. Benson*, 3 Atk. 248; *Ware v. Horwood*, 14 Ves. 28; *Eyre v. Everett*, 2 Russ. 381; *Gordon v. Calvert*, 4 Russ. 581; *Harrison v. Nettleship*, 2 Myl. & K. 423; and see Lord Eldon's observations in *ex parte Flint*, 1 Swanst. 30.

to be had against him at law, a court of equity will not, upon motion, grant him an injunction to stay execution, except upon the terms of paying the money into court (*y*): since it was the duty of the surety to have had recourse to a court of equity, and not to have allowed a judgment at law to have been had against him. But if the surety was, at the time when judgment was pronounced against him in the court of law, ignorant of the circumstances upon which his right to equitable relief is founded, a court of equity will, if it sees a probability of the surety's ultimately obtaining a decree in his favour, grant him an injunction to stay execution, without payment of the money into court (*z*).

Proceedings by the landlord after judgment by default, in an action on a replevin bond, will be stayed at the instance of the sureties, upon paying into court the value of the goods distrained and costs, though the rent in arrear at the time of the distress made, exceeded in amount the value of the goods distrained (*a*).

In *Bleaden v. Charles*, (*b*) P. had deposited with C., as a security for goods sold, a bill of exchange accepted by S., for which S. had received no value; P. afterwards paid for the goods, and asked for the restoration of the bill, but C. indorsed it for value to H., who sued S. and recovered; and it was held, that S. might recover of C. the amount of the bill in an action for money paid to the use of C., there being a privity between them arising out of the manner in which the bill was obtained, and deposited as a security; C. being apprised that nothing was due from S. to P.

The 52nd section of the late Bankrupt Act, 6 Geo.

(*y*) *Mayhew v. Crickett*, 2 Coll. 420.

Swanst. 185; S. C. 1 Wils. C. C. 418.

(*z*) *Blake v. White*, 1 You. &

(*a*) *Gingell v. Turnbull*, 3 Bing. N. C. 881.

(*b*) 7 Bing. 246.

4, c. 16, enacts, "that any person who at the issuing the commission shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt or any part thereof in discharge of the whole debt (although he may have paid the same after the commission issued), if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said commission, which such creditor possessed, or would be entitled to, in respect of such proof; or, if the creditor shall not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail, as aforesaid, after an act of bankruptcy committed by such bankrupt: provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed."

To entitle the surety, therefore, to stand in the place of the creditor, as to dividends (*c*), and all other rights (*d*), (among which are included the choice of assignees, and the power to assent to, or dissent from, the allowance and confirmation of the bankrupt's certificate) (*e*), which such creditor possessed, or would be entitled to, in respect of

(*c*) *Ex parte Rushforth*, 10 Ves. 409; *ex parte Brook and Chatteris*, 2 Rose, 334; *ex parte Turner*, 3 Ves. 343; *Payley v. Field*, 12 Ves. 435; *ex parte Gee and Milnes*, 1 Glyn & Ja. 330; and see *Martin v. Brecknell*, stated *ante*, p. 97.

(*d*) *Ex parte Rogers*, 4 Deac.

& Ch. 623; S. C. 2 Mont. & Ay. 153.

(*e*) *Ex parte Gee v. Milnes*, *supra*; *Browne v. Carr*, 2 Russ. 600; S. C. 7 Bing. 508; *Ratcliffe v. Gunson*, 6 Madd. 193; *ex parte Herbert*, 2 Glyn & Ja. 66; *ex parte Taylor*, 1 Glyn & Ja. 399.

such proof, it is essential that the surety pay to the creditor the whole of what is due to him from the principal (*f*), or a part in discharge of the whole.

Upon payment to the creditor by the surety of the amount of his own obligation (where the engagement of indemnity is to a limited amount), the surety will, where the creditor has proved, be entitled, *pro tanto*, to stand in the place of the creditor (*g*), though the debt proved by the creditor, under the *fiat* of the principal, may be different (*h*), or to a larger amount (*i*); and such surety is entitled to dividends upon proof by the creditor under the bankruptcy of the principal debtor, subject to a deduction of the proportion of the dividends upon the residue of the debt proved, beyond that for which the surety was engaged, supposing that expunged; thus, if the surety limits his liability to the sum of 1,000*l.*, and the principal is, at the time of his bankruptcy, indebted to the creditor in the sum of 2,000*l.* (including the sum of 1,000*l.*, for which the surety is answerable), and the creditor proves his whole demand under the bankruptcy, and receives from the bankrupt's estate 5*s.* in the pound, the surety is entitled to the sum of 250*l.* in respect of the dividends so received by the creditor, and will be held discharged from his liability on payment to the creditor of 750*l.* (*j*); and paying that sum, is entitled to a proportion of the dividends under the proof by the creditor to any greater amount under the bankruptcy of the principal debtor (*k*). And if the creditor has any mortgage, or if any pledge has been deposited

(*f*) *Capel v. Butler*, 2 Sim. & S. 457; and see *Browne v. Carr*, 2 Russ. 600.

(*g*) *Ex parte Turner*, 3 Ves. 343.

(*h*) *Ex parte Turner*, *supra*.

(*i*) *Ex parte Turner*, *supra*; *ex parte Rushforth*, 10 Ves. 409; *Paley v. Field*, 12 Ves. 435.

(*j*) *Ex parte Rushforth*, 10 Ves. 409.

(*k*) *Ex parte Rushforth*, *supra*.

with him by way of indemnity, or as a collateral security for the repayment of the money for which the surety had become responsible, the surety is entitled to have the same made available in the first instance in reduction of the debt for which he is answerable (*l*). But the surety is not entitled to the benefit of proof against other estates, in respect of which (the transactions being distinct) the creditor may have distinct securities (*m*).

If, however, the security given by the surety is for the whole debt of the principal (the contract of the surety not limiting the advances of the creditor), as in a case where the surety deposits with the creditor bills of exchange accepted by him for the accommodation of the bankrupt principal, *as a security for any floating balance that may be due from the principal to the creditor*, the surety is not entitled, upon payment by him to the creditor of the amount of his acceptances, to have paid to him by the creditor any dividends previously received by the creditor under the principal's bankruptcy, if the creditor's debt is then unsatisfied (*n*). But inasmuch as that portion of the creditor's debt, as shall have been paid by the surety, will be ordered to be expunged from the proof, the assignees under the bankruptcy will be considered to be trustees for the surety in respect of any future dividends that would (if such proof had not been expunged) have arisen on that part of the creditor's debt so paid by the surety, and the surety will be entitled to receive those dividends instead of the creditor (*o*).

It seems that the Court of Bankruptcy will, if necessary, and upon payment to the creditor by the surety of the debt of the principal, direct the credi-

(*l*) *Ex parte Rushforth, supra* ;
and see in the matter of *West-*
zinthus, 5 B. & Ad. 817.

(*m*) *Paley v. Field*, 12 Ves. 435.

(*n*) *Ex parte Holmes*, 3 Deac.
662.

(*o*) *Ex parte Holmes, supra*.

tor (upon receiving a proper indemnity from the surety) to sue out a *fiat* against the principal debtor, so as to work out the surety's indemnity by payment (*p*); or will, where the debt has been paid, and the proof expunged, direct it to be reinstated for the surety's benefit (*q*).

Where the petitioning creditor issued a *fiat* on a debt which was afterwards reduced to a sum below 100*l.*, and consequently of itself insufficient to support the *fiat*, but who had also accepted bills of exchange for the accommodation of the bankrupt (the amount of which bills added to the petitioning creditor's debt exceeded the sum of 100*l.*), and which bills had been indorsed by the bankrupt to C., and had been by him proved under the *fiat*, and the same were subsequently paid by the petitioning creditor: it was held, that on indemnifying C., and on presenting a petition in the name of C. for that purpose, the petitioning creditor was entitled, under the 6*th* of Geo. 4, chap. 16, sections 18 & 52, as a surety paying the debt, to substitute the debt so proved on the bills by C., for the original petitioning creditor's debt, so as to support the *fiat*, notwithstanding the words "any other creditor" in the 18*th* section (*r*).

(*p*) See the observations of Sir George Rose in *ex parte Rogers*, 4 Deac. & Ch. 623; S. C. 2 Mont. & Ay. 153.

(*q*) *Ex parte Matthews*, 6 Ves.

285; and see *ex parte Holmes*, *supra*.

(*r*) *Ex parte Rogers*, 4 Deac. & Ch. 623; S. C. 2 Mont. & Ay. 153.

CHAPTER II.

OF THE RIGHTS AND REMEDIES OF THE SURETY,
WITH RELATION TO THE PRINCIPAL.

I. BEFORE payment.

II. As to payment.

III. After payment.

I. Before payment.

A surety may, it would seem, *when his liability has attached by reason of the default of the party for whom he became responsible*, notwithstanding the surety may not have been sued by the creditor, or the person to whom the instrument of suretyship was given, apply to a court of equity for the purpose of compelling the principal to relieve him from his liability (*s*); "for if a person is security on a contract, there is a joint contract that the principal shall indemnify the security, and that the ground of equity is, that when the money is due the equity arises" (*t*); and it is unreasonable that a surety should be for ever at the mercy of the creditor, in respect of an engagement which ought to be performed by the principal (*u*). But to entitle the surety to such equitable relief, there must have been (as before observed), a failure of the engagement on the part of the principal; as where the principal engaged to pay the creditor a sum of money at a time stated, and the day of payment had

(*s*) See the observations of Lord Thurlow, C., in *Nisbett v. Smith*, 2 Bro. C. C. 579; of Lord Cowper, C., in *Hungerford v. Hungerford*, Gilb. Eq. Rep. 67; of Sir Joseph Jekyll, M. R., in *Lee v. Rook*, Mos. 318; of Lord Keeper North, in *Ranelagh v. Hayes*, 1 Eq. Ca. Ab. 79, pl. 5; S. C. 1 Vern. 190; S. C. 2 Ch. Ca. 146; and of Sir

William Grant, M. R., in *Antrobus v. Davidson*, 3 Meriv. 569; and see *Evelyn v. Evelyn*, 2 P. Wms. 659; S. C. 20 Vin. Abr. 103, pl. 7.

(*t*) *Per* Lord Cowper, C., in *Hungerford v. Hungerford*, *supra*.

(*u*) See the observation of Lord Keeper North in *Ranelagh v. Hayes*, *supra*.

elapsed without payment of the money (*v*): and a bill will not lie upon any general equity by a surety to have an indemnity, or to have the money paid into court, where the day of payment has not elapsed, and the surety has not been damnified (*w*).

Where the principal, with the view to indemnify the surety, in consequence of his having become answerable for him to the creditor in a certain amount, gives the surety a bond conditioned for the payment to the surety, at a day named, of the same or other sum of money (though really given by way of indemnity), the debt accrues from the day mentioned in the condition, and if the money is not then paid by the principal to the surety, the condition is broken, and the surety may sue the principal upon the bond (*x*), although the surety may not have been called upon by the creditor (*y*), or have paid him any thing in respect of the original transaction (*z*); and the principal will not be allowed to plead that the bond was given by him to the surety, merely as an indemnity (*a*).

If the surety has received from his principal a bond of *indemnity* merely, the surety must show that he has been damnified (*b*), and having so done, the bond, at law, becomes forfeited (3).

(*v*) See Lord Eldon's observations in *Cock v. Ravie*, 6 Ves. 283.

(*w*) *Dale v. Lolley*, 2 Bro. C. C. 582, *in notis*, Belt's ed.

(*x*) See the judgment of Bayley, J., in *Penny v. Foy*, 8 B. & Cress. 11; *S. C.* 2 Man. & Ry. 181; and see *Touissant v. Martinnant*, 2 T. R. 100.

(*y*) *Per* Bayley, J., in *Penny v. Foy*, *supra*; and see *Touissant v. Martinnant*, *supra*.

(*z*) *Per* Bayley, J., in *Penny v. Foy*, *supra*; and see *Holmes v.*

Rhodes, 1 Bos. & P. 638; *Touissant v. Martinnant*, *supra*.

(*a*) *Mease v. Mease*, Cowp. 47; *Holmes v. Rhodes*, *supra*.

(*b*) *Challoner v. Walker*, 1 Burr. 574; *Duffield v. Scott*, 3 T. R. 374; *Cutler v. Southern*, 1 Saund. 116; *S. C.* 1 Lev. 194; and see the judgments of Bayley, J., in *Penny v. Foy*, 8 B. & Cress. 11; *S. C.* 2 Man. & Ry. 181; and of Gibbs, C. J., in *Young v. Taylor*, 8 Taunt. 315; *S. C.* 2 J. B. Moo. 326.

(3) *Of the forfeiture of administration bonds.*

In pursuance of the statutes 21 Hen. 8, c. 5, and 22 & 23 Car. 2, c. 10, sufficient bonds, with two or more sureties, are directed to be

Where a surety is bound for the due payment by the principal to the creditor of a sum of money at a

taken by all ordinaries, and ecclesiastical judges, having power to commit administration of the goods of persons dying intestate, from the person or persons to whom administration is committed, conditioned for the making a true and perfect inventory by such administrator or administrators of all the goods, chattels, and credits of the deceased, and for the well administering by such administrator or administrators of such goods according to law.

The object of these statutes, in directing bonds to be taken, was, that the effects of the intestate should be preserved for the benefit of those persons who were entitled to distribution as next of kin (*The Archbishop of Canterbury v. Willis*, 1 Salk. 315); and as creditors had, previously to the passing of these acts, a remedy by law for the recovery of their debts, it has been held, upon the construction of these bonds, that a creditor cannot assign, as a breach of the condition of the bond, that the intestate was indebted to him in a certain sum of money, and that assets to the amount of his debt had come to the hands of the administrator, and that such debt had not been paid by the administrator (*Brown v. the Archbishop of Canterbury*, Lutw. 271; *Ashley v. Baillie*, 2 Ves. 368); even if the creditor suggests a *devastavit* by the administrator. (*The Archbishop of Canterbury v. Willis*, *supra.*) Nor is the administrator (he having duly made and delivered his inventory and account) bound by the condition of his bond to distribute the surplus of the intestate's effects, after payment of his debts, among the next of kin, unless the ecclesiastical court, into which his inventory and account have been exhibited, has pronounced a decree for that purpose (*The Archbishop of Canterbury v. Tappen*, 8 B. & Cress. 151; *the Archbishop of Canterbury v. Robertson*, 1 Cr. & Mees. 181, 690); for by the words of the bond the ordinary or judge is to make the distribution among the persons entitled, and the administrator is to pay according to his decree or sentence, so that the decree or sentence of the ordinary is to precede the payment.

But a breach of the condition of the administration bond takes place if the administrator does not make and deliver a perfect inventory and account of the goods of the intestate on or before the day appointed by the ordinary, and stated in the administration bond, and this without any previous citation or sentence of the ecclesiastical court (*The Archbishop of Canterbury v. Willis*, 1 Salk. 315); and a creditor has a right, *ex debito justitiæ* (*The Archbishop of Canterbury v. House*, Cowp. 141; *Greenside v. Benson*, 3 Atk. 248), as well as the next of kin, to sue the administrator or his sureties upon the bond in the name of the ordinary.

And where the administrator, having converted to his own use a part of the intestate's effects, afterwards became bankrupt, whereby those effects were entirely lost to the estate of the intestate, it was held to be a breach of the condition of the bond, by which the administrator undertook well and truly to administer according to law, as would entitle the next of kin to have the bond put in suit at their instance. (*The Archbishop of Canterbury v. Robertson*, *supra.*) But if the administration bond is not within the 21 Hen. 8., (as, for

day named, and the surety has a counter-bond from the principal to save him harmless, non-payment by the principal to the creditor of the money, upon the day named in the original bond, is a forfeiture of the counter-bond, though the surety be not otherwise damnified; for by failure of payment of the money to the creditor by the principal at the day named, the principal has put the surety in danger to be arrested, which is a damnification, and so consequently a present breach of the condition, and a forfeiture of the bond (c). So in *Broughton's case* (d), it was held by Bryan and Littleton, Justices, upon an action brought by the surety upon a bond of indemnity, that terror of suit, so that the surety dare not go about his business, is a damnification, although he be not arrested or forced by process (e).

If the condition of the bond given by the principal to the surety is broken, the surety's right to sue *at law* becomes absolute (4), and it seems that equity would give the principal no relief, except upon payment by him of all that is due in respect of the transaction to which the surety was a party (f).

(c) See *Abbots v. Johnson*, 3 Bulstr. 233.

(d) 5 Rep. 24.

(e) *S. P. Bartwright's Case*, Ow. 19; and see *Ker v. Mitchell*, 2 Chit. 487; *Cutler v. Southern*, 1 Saund.

116; but see the observations of Lord Ellenborough in *Sparkes v. Martindale*, 8 East, 593.

(f) See *Anon. Cary*, 26, and cases *supra*.

example, a bond granted to an administrator *durante minori etate*, with the will annexed), it is a breach of the condition if the administrator, having paid the debts, and having assets in his hands, has not paid the legacy. (*Folkes v. Docminique*, 2 Stra. 1137.)

(4) In *Ikin v. Brook* (1 B. & Ad. 124), the defendant, together with James West, as the assignees of the estate of one John Ikin, a bankrupt, had preferred certain claims against the plaintiff, in respect of transactions which had taken place between the plaintiff and John Ikin; to compromise which, the plaintiff, in pursuance of an agreement entered into between him and the assignees, delivered to the assignees two promissory notes for 100*l.* and 400*l.*, and a *cognovit*, which the assignees consented to receive as a composition for, and

If the principal, under the belief that he is entitled to certain property, makes what he conceives to be a conveyance or assignment of that property to the creditor, as a collateral security for the payment of a debt, for the payment of which the surety has also become responsible, and the principal has not, at the time when he makes such conveyance or assignment, any title to the property so professed to be conveyed or assigned, but subsequently acquires a good title, equity, upon the application of the creditor or the surety, will compel the principal to make a new assurance to the creditor for the protection of the surety; or if the surety has been called upon to pay the money, for which as surety he was liable to pay, the surety has an equity to have the benefit of a conveyance, or an assignment, of the subsequently acquired title (g). So where a surety, to whom certain estates have been conveyed, and with whom the title-deeds have been deposited by way of indemnity, has been induced to deliver up those deeds, upon a fraudulent misrepresentation by the principal that the debt has been paid, he will, nevertheless, be held to have a lien on the title-deeds for the amount of what he should pay, or be liable to pay to the creditor, the

(g) See *Seabourne v. Powell*, 2 Ca. 274; *S. C.* 2 *ib.* 212; *Noel v. Vern.* 11; *Taylor v. Debar*, 1 Ch. *Bewley*, 3 Sim. 103.

satisfaction of, all claims which they, as such assignees, had against the plaintiff; and in consideration of the money so secured to be paid to them, the assignees promised to indemnify the plaintiff against a certain bill of exchange, and against every other liability on account of John Ikin. The plaintiff, having been sued on certain bills of exchange, which were liabilities incurred on account of John Ikin, was compelled to provide for their payment, and it was held, that the plaintiff might sue the assignees upon the indemnity, notwithstanding he had not, before action brought, paid the whole of his two notes for 500*l.*; for, upon the construction of the instrument of guarantee, the security for the 500*l.*, and not the actual payment of that sum, was the consideration for the indemnity, which indemnity was to take effect immediately.

legal estate being clothed with a trust to indemnify the surety, and cannot be taken out of his hands till the indemnity is worked out (*h*).

II. As to payment.

As soon as default has been made by the principal, in the performance of the engagement, for the fulfilment or performance of which by the principal, the surety made himself liable, the surety may discharge the obligation, and relieve himself of his liability (*i*). If the obligation which the surety engaged his principal should perform, is the payment of a sum of money, and the money is due to the creditor under the contract, the surety may pay the creditor the money due to him, even though he did not pay the debt by the desire of the creditor (*j*); for the joint obligation of the principal and surety towards the creditor, is sufficient to prove the principal's consent or authority to the making that payment (*k*) (5).

(*h*) *Tyson v. Cox*, T. & Russ. 395.

(*i*) See the judgment of Lord Kenyon, C. J., in *Exall v. Partridge*, 8 T. R. 308.

(*j*) See the judgment of Lord

Kenyon, C. J., in *Exall v. Partridge*, *supra*; and see *Broughton's Case*, 5 Rep. 24.

(*k*) *Per* Lord Brougham, C., in *Hodgson v. Shaw*, 3 Myl. & K. 183.

(5) And it seems, that a person who has placed himself, as regards the creditor, in a situation, whereby he is bound, in a *moral* point of view, to discharge the debt (failing the person who has had the benefit of the contract), although not legally liable to the creditor (as, for example, where the contract is a collateral contract, and the Statute of Frauds has not been complied with), may, nevertheless, pay the money to the creditor, and maintain an action against the debtor in respect of such payment; thus, if A. make a purchase of goods, B. being present, and B., in the presence of A., pledges his credit to pay for the articles selected by A., if A. do not pay; A. being the party benefited, and allowing B. to stand by and pledge his credit, undertakes, if B. pay the money, to repay the money paid by B. on his account. (*Simpson v. Penton*, 2 Cr. & Mees. 430; and see *Alexander v. Vane*, stated *ante*, p. 3, in n.; and see Dig. lib. XVII. tit. 1, lex. 29, § 6; from which it appears, that the civil law permitted the surety to waive his legal personal right to dispute the creditor's demand, where he could have done so with effect, in a case where the surety was *morally* bound to discharge the obligation.)

A surety, when his liability has occurred, is justified in entering into a compromise with the creditor, or party to whom the principal is liable, where the payment made by the surety does not exceed the amount which the person indemnifying is bound to pay (*l*); notwithstanding the surety give no notice to the principal of his intention to compound (*m*); for the only effect of a want of notice to the principal is to let in proof on his part that the compromise was improperly made, and that the principal might have obtained better terms, if the opportunity had been given to him (*n*).

(*l*) *Butcher v. Churchill*, 14 *supra*.
 Ves. 567; and see *Smith v. Compton*,
 3 B. & Ad. 407. (n) See *Smith v. Compton*,
supra; *Duffield v. Scott*, 3 T. R.
 (m) See *Smith v. Compton*, 374.

So where P., the owner of a ship, of which S. was the captain, despatched the latter to a place beyond the seas, with instructions to purchase a cargo of timber, and to draw upon P. for the amount, and S. accordingly proceeded to the place directed, and there purchased some timber from one C. to a certain amount, and drew a bill on P. for that amount, at sixty days' sight, in favour of the seller or his order, and which bill was duly presented for acceptance, and protested for non-acceptance, and that, subsequently to the bill's becoming due, S. (being at the time at the place at which the timber had been purchased) was arrested upon the bill, which he paid, in order to release himself from the arrest. S. then brought a special action of *assumpsit* against P. for not paying the bill—for not accepting it—and for not indemnifying the plaintiff from all loss, &c. sustained by him from having drawn the bill. It did not appear upon the trial of the cause, whether the plaintiff had received any notice of the dishonour of the bill, either from the then holder, or from the defendant, who had got the cargo, and it was therefore urged, on the part of the defendant, that as the plaintiff did not appear to have had notice of the bill's dishonour, he was under no legal obligation to pay it, and paid it of his own wrong: but it was held, that the defendant could not insist on the want of proof of notice to the plaintiff of the dishonour of the bill as a defence to the action. (*Huntley v. Sanderson*, 1 Cr. & Mees. 467.)

So if an infant requests J. S. to be bound for him to another for the payment of a sum of money which he was to borrow for the infant's use, to which J. S. agrees, and J. S. is afterwards called upon to pay, and pays the money for the infant, and the infant, when of age, promises J. S. to repay him; although, upon payment by the promisee, the latter could not maintain *assumpsit* against the promisor, yet an action upon the case lies. (*Edmond's Case*, 3 Leon. 164, pl. 215; and see *Lee v. Rook*, Mos. 318.)

III. After payment. 1st. Where the principal is solvent; and, 2ndly. Where the principal is bankrupt or insolvent.

1st. Where the principal is solvent.

Upon payment by the surety to the creditor of the debt of the principal, the surety may enforce its repayment from the principal debtor, in an action of *indebitatus assumpsit* at law (*o*); or (where he has no counter-security from the principal), by bill in equity (*p*) (6); and payment by the surety's attorney or agent is (it would seem) sufficient, though at the time of action brought by the surety against the principal, the money had not been repaid by the surety; the allegation of payment being sufficiently proved, by showing that the creditor had been satisfied, and could make no further claim; it being immaterial, as regards the principal, in what way the surety afterwards settles the account with the person who paid the money at the surety's request (*q*). If, however, the principal is a defaulter to the crown, and his surety makes good to the crown the debt due from the defaulting principal, the surety is entitled to stand in the place of the crown, and to have the same remedy that the crown itself would have had (*r*).

(*o*) *Morrice v. Redwin*, 2 Barnard. 26; *Huntley v. Sanderson*, 1 Cr. & Mees. 467; and see *Hodgson v. Shaw*, 3 Myl. & K. 183; *Cartwright v. Cooke*, 3 B. & Ad. 701; *Layer v. Nelson*, 1 Vern. 456; and the judgments of Lord Kenyon, C. J., in *Exall v. Partridge*, 8 T. R. 308; and of Lord Eldon, C., in *Wars v. Horwood*, 14 Ves. 28; and *post*, part 4, chap. I, "Of Actions by the Surety against the Principal."

(*p*) *Ford v. Stobridge*, Nels. 24; and see the observation of Lord Cowper, C., in *Hungerford v. Hungerford*, Gilb. Eq. Rep. 67.

(*q*) See *Adams v. Dansey*, 6 Bing. 506; S. C. 4 Moo. & P. 245.

(*r*) *Doughty's Case*, Wightw. 2, n. b; *Babb's Case*, Wightw. 2, n. c; *Rea v. Bennett*, Wightw. 1; *Anon.* Sav. 30, pl. 72; and see Lord Eldon's judgment in *Whitehouse v. Partridge*, 3 Swanst. 365.

(6) A recourse to a court of equity for this purpose is now rendered unnecessary, as the surety is permitted in a court of law to recover in an action of *assumpsit* (which formerly he was not allowed to do), the money paid by him on account of his principal. (See *post*.)

If the creditor, in a suit instituted by him against the principal and his surety, is paid by the surety, what the Master reports to be due to the former in respect of his demands, and for his costs of the suit, the Court will, upon further directions, make a declaration that the principal ought to indemnify the surety in respect of such payments, and reimburse the surety what he has so paid, and that the surety shall be at liberty to prosecute the decree against the principal in the name of the creditor, and make use of the name of the creditor for that purpose, the surety indemnifying the creditor against any costs or damage he may be liable to on that account (*s*). And if the creditor has a mortgage on property belonging to the principal, the equity of redemption in which the creditor by his bill seeks to foreclose, the creditor will, upon payment being made to him by the surety (the latter being a party to the suit) of what is due for principal, interest, and costs, be ordered to convey the mortgaged premises to the surety, or as he should direct (*t*). So in a suit instituted by one surety against his co-sureties for contribution, the principal will be decreed to indemnify the plaintiff and his co-sureties (*u*).

Courts of law permit the surety to recover from the principal, in an action of *assumpsit*, the money so paid by the surety, upon the ground that in the absence of an express stipulation between the parties, a promise is raised by *implication of law* on the part of the principal, to repay the money so paid by the surety for the principal's use (*v*) (7) : but

(*s*) *Weston v. Woolball*, Set. on Dec. 244; and see Lord Hardwicke's observations in *Walker v. Preswick*, 2 Ves. 622.

(*t*) *Beckett v. Micklethwaite*, 6 Madd. 199.

(*u*) *Greerside v. Benson*, 3 Atk.

253, in *notis*; *Lawson v. Wright*, 1 Cox, 275.

(*v*) See the judgments of Ashurst and Buller, Justices, in *Toussaint v. Martinant*, 2 T. R. 100, (7.)

(7) From the observation of Mr. Justice Buller, in *Toussaint v. Mar-*

the rule only applies where no other remedy exists ; consequently, if the surety take from his principal any security upon which he may proceed for the recovery of the money paid by him, he cannot resort to an action of *assumpsit*, but is left to the remedy given to him by the security which he has thought proper to take (*w*).

It has been observed, that it is the right of the surety, in the events which have been mentioned, to compound with the creditor (*x*), but in so doing, the surety is entitled to claim from the principal no more than he has actually paid (*y*), it being his duty to settle the debt of the principal upon the best terms he can, and if he get rid of the obligation at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the whole amount, and can only claim, as against his principal, what he has actually paid in discharge of the common obligation (*z*).

A person who has become bail for another is entitled to recover from his principal all expenses fairly arising from his situation as bail, the relation of principal and bail being the indemnity of the principal as regards the bail, in respect of all charges which are necessary for his security, and

(*w*) See the observations of Ashhurst and Buller, Justices, in *Toussaint v. Martinnant*, *supra* ; and see *Crafts v. Tritton*, 8 Taunt. 365 ; S. C. 2 J. B. Moo. 411.

(*x*) See *ante*, p. 131.

(*y*) *Butcher v. Churchill*, 14 Ves. 567 ; *Reed v. Norris*, 2 Myl. & Cr. 361.

(*z*) *Reed v. Norris*, *supra* ; and see *Smith v. Compton*, 3 B. & Ad. 407.

tinnant, it seems, that a surety who paid the debt of his principal had formerly no remedy against him *at law*, except he had a counter-security, but was driven to a court of equity for relief ; and even now, the remedy at law for the surety who pays the debt of his principal, must (in general) be confined to those cases where the surety appears to be so upon the instrument itself ; for if P. and S., as principal and surety, are co-obligors in a bond, which upon the face of it appears a common money bond, and the surety discharges the bond, and has no other security, he must (it is conceived) have recourse to a court of equity to obtain repayment.

he may therefore recover his expenses in sending after the principal (who had absconded), to take him in order that he might surrender him in discharge of himself (*a*); he cannot, however, maintain an action for his trouble and loss of time, in going to a place to become bail for another; because he does not undertake the journey as work or labour, or as a person employed by the defendant, but merely as a friend from motives of kindness (*b*). Nor will the surety be allowed his costs if he put the party to a useless expense, by defending an action which he ought not to have defended (*c*), notwithstanding he may have received an indemnity (*d*). However, it is said, that if a party be surety to the crown, and an extent is taken out against his effects, and some expenses have been incurred in consequence of the surety's disputing the debt (*though a just one*), he, nevertheless, shall be allowed those expenses; as an extent is both an action and an execution in the first instance, and the surety cannot be supposed to be prepared to pay the debt immediately (*e*).

2ndly. Where the principal is bankrupt, or insolvent.

To entitle the surety to go in and prove under the *fiat* issued against his principal, the debt, for which the party is surety, must be a subsisting debt at the time of the issuing of the *fiat*, and payment or satisfaction must be made to the creditor by the surety, in respect of such debt (*f*). Where S. was a surety for the payment of rent by a lessee to his landlord, which rent did not

(a) *Fisher v. Fallows*, 5 Esp. 171.

(b) *Reason v. Wirdnam*, 1 Car. & P. 434.

(c) *Bleaden v. Charles*, 7 Bing. 246; *Roach v. Thompson*, Mood. & M. 487; and see *Fisher v. Fal-*

lows, 5 Esp. 171.

(d) *Gillett v. Rippon*, Mood. & M. 406.

(e) *Per Lord Hardwicke, C.*, in *ex parte Marshall*, 1 Atk. 262.

(f) See *ante*, p. 101, *et seq.*

become due until *after* (8) the bankruptcy of the lessee, it was held, that the money paid by the surety, in respect of such rent, could not be proved by the surety under the commission issued against the lessee (g).

Neither can a surety, who has received a bond of indemnity from his principal, whether the bond is in its form conditional or absolute, go in and prove under the *fiat* issued against the principal, if no payment has been made by the surety, notwithstanding the bond was forfeited before the bankruptcy (h); but the forfeiture of an indemnity bond, before the bankruptcy of the principal obligor, entitles the surety to prove under the *fiat*, in respect of payments made by him subsequently to the bankruptcy, as well as in respect of payments made by him prior to the bankruptcy (i). And where no payments have been made by the surety, the Court of Bankruptcy will allow a claim to be entered, and a dividend to be reserved, without prejudice to the ultimate right to prove, if the claimant should be damnified (j).

Where a surety in a warrant of attorney, in order to discharge himself from his personal liability, paid part of the debt due to the creditor of

(g) *M'Dougal v. Paton*, 8 Taunt. 584; *S. C.* 2 J. B. Moo. 644.

(h) *Ex parte Finden*, Coe. B. L. 163, ed. 1812; *ex parte Brown*, *ib.*; *Young v. Taylor*, 8 Taunt. 315; *S. C.* 2 J. B. Moo. 326, overruling on this point *Toussaint v. Martinant*, 2 T. R. 100; *Martin*

v. Court, 2 T. R. 640; and *Hodgson v. Bell*, 7 T. R. 97.

(i) *Ex parte Cockshott*, 3 Bro. C. C. 502; and see *ex parte Marshall*, *ante*, p. 105.

(j) *Ex parte Marshall*, 1 Mont. & Bli. 242; *S. C.* 2 Deac. & Ch. 589.

(8) Where S. accepted a bill of exchange for the accommodation of P. before an act of bankruptcy committed by P., and *after* the act of bankruptcy paid the amount to a third person, to whom it had been negotiated, it was held, that the payment by S. did not create a good petitioner's debt; for S. only became a creditor by payment, which was not till after the act of bankruptcy. (*Ex parte Holding*, 1 Glyn & Ja. 97.)

a bankrupt, who had proved under the commission, and satisfaction was thereupon entered on the record, it was held, not to be a payment of part of the debt, in discharge of the whole (*k*). And where a surety who had become bound in a bond for the bankrupt, joined the bankrupt, after he had obtained his certificate, in a new bond to the credi-

(*k*) *Soutten v. Soutten*, 5 B. & Ald. 852; *S. C.* 1 Dowl. & Ry. 521, (9).

(9) The case of *Soutten v. Soutten* was an action brought by the surety against the principal to recover money paid to the creditor, the same being, as he alleged, not the whole of the creditor's demand, or a part in discharge of the whole, but merely a sum of money in order to discharge himself from his personal liability, and the plaintiff therefore contended that it did not fall within the provisions of the Statute, which enabled him to prove, or to stand in the place of the creditor, and that, consequently, the defendant was not discharged from his liability, and the plaintiff had a verdict. Notwithstanding some expressions in the judgment of the Court, as reported in Barnewall and Alderson's Reports, which would seem to imply the contrary, the verdict which the plaintiff obtained was (as it would seem) entirely owing to the defendant's not having pleaded his bankruptcy and certificate. (See *Westcott v. Hodges*, 5 B. & Ald. 12, stated *infra*; and Lord Ellenborough's judgment in *Stedman v. Martinant*, 12 East, 664.) Whether the surety thinks proper to avail himself or not of the power given to him under the Statute, of "standing in the place of such creditor as to the dividends and all other rights which such creditor possessed, or would be entitled to in respect of such proof" (see *section 52 of stat. 6 Geo. 4, c. 16*), is totally immaterial to the principal, who, if the surety has the power "of standing in the place of the creditor," is discharged from all claims as well of the surety as the creditor; thus, where P., with two persons as his sureties, entered into a bond to the king, the condition of which was that P., as sub-distributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum, and also the price of such vellum, together with all monies which he should receive on account of the duties on personal legacies and stage coaches; and P., as distributor, became indebted to the king in a certain sum, and afterwards became bankrupt and obtained his certificate; and a *scire facias* having issued upon the bond, one of the sureties paid a sum of money to compromise the suit, and a certain other sum in defending the same: it was held, in an action brought by the surety to recover these sums from the bankrupt, that the plaintiff was a personal surety, or liable for a debt of the bankrupt, within the meaning of the 49 Geo. 3, c. 121, s. 8, corresponding to *section 52 of the stat. 6 Geo. 4, c. 16*, and consequently that the latter was protected by his certificate. (*Westcott v. Hodges*, 5 B. & Ald. 12.)

tor, and the old bond was thereupon delivered up to the surety, it was held, that this was not equivalent to payment by the surety, so as to enable him to prove under the bankrupt's commission (1).

The 52nd section of the act of 6 Geo. 4, c. 16, above referred to (m), applies to equitable as well as legal sureties; thus, a person who indorses (n), draws (o), or accepts (p) a bill of exchange for the accommodation of the drawer, may, after payment made by such indorser, or acceptor, prove under the *fiat* against the bankrupt drawer. So if both the drawer and acceptor are both sureties for a third party, and the drawer, upon the bankruptcy of the acceptor, pays the amount of the acceptance, he is entitled to prove the amount under the bankruptcy of the acceptor (q), notwithstanding the drawer had received an indemnity against any loss he might sustain in consequence of his having drawn such bill (r). So where a person joins another in a bond to the crown, as a surety for the latter's duly accounting, he is a surety within the

(d) *Ex parte Serjeant*, 1 Glyn & Ja. 183; S. C. 2 Glyn & Ja. 23.

(m) See *ante*, pp. 120 & 121.

(n) *Bassett v. Dodgin*, 9 Bing. 653; *Haigh v. Jackson*, 3 Mees. & W. 598, (1).

(o) *Ex parte Lobbon*, 17 Ves. 334.

(p) *Stedman v. Martinnant*, 12 East, 664; S. C. 13 East, 427; *Vansandau v. Corsbie*, 8 Taunt. 550; *ex parte Lloyd*, 1 Rose, 4; S. C. 17 Ves. 245; S. C. 2 J. B. Moo. 602; S. C. 3 B. & Ald. 13.

(q) *Ex parte Hunter*, 2 Glyn & Ja. 7.

(r) *Ex parte Hunter, supra*.

(1) In this case, the defendant having a sum of money owing to him by a third party, the plaintiff, at the defendant's request, and for his accommodation, drew a bill of exchange on that party for the amount, which the latter accepted; the plaintiff indorsed the bill and handed it over to the defendant, who also indorsed and negotiated it. Before the bill became due, the defendant had become bankrupt, and the bill being dishonoured, was taken up by the plaintiff; and it was held, in an action brought to recover the amount of the bill of exchange so paid by the plaintiff, that the amount of the bill paid by the plaintiff was proveable by him under the defendant's *fiat*, and therefore the right of action against the defendant was barred by his certificate.

meaning of the act (*s*). So where upon the dissolution of a partnership, one partner retires, and the remaining partner agrees to indemnify the outgoing partner against the partnership debts, and the outgoing partner is, after the bankruptcy of the remaining partner, compelled to pay partnership debts, such payments are proveable by the outgoing partner under the *fiat* issued against the remaining partner (*t*); and this, notwithstanding the retiring partner knew the firm to be insolvent at the time he received the indemnity (*u*). So a solvent partner, winding up the partnership concerns, is entitled to prove under a commission against bankrupt partners, the share of the loss or deficiency which each partner ought to have borne as a debt against his separate estate (*v*). And if the surety fails to prove his debt, the certificate of the bankrupt is a bar, as well to the principal debt, as to any consequential damage arising from that debt not having been paid (*w*).

The surety is only entitled to money paid, and interest (when the debt carries interest), up to the date of the *fiat* (*x*), unless there be a surplus (*y*). And even where there is a surplus, he will not, in a case where he has been called upon to pay, and pays the debt of his principal subsequently to the bankruptcy, be allowed interest on his payment, unless the creditor himself could have claimed such

(*s*) *Westcott v. Hodges*, 5 B. & Ald. 12.

(*t*) *Wood v. Dodgson*, 2 M. & Sel. 195; S. C. 2 Rose, 47; *ex parte Ogilby*, 2 Rose, 177; S. C. *nom. ex parte Ogilby*, 3 Ves. & B. 133; and see *Dally v. Wolferston*, 3 Dowl. & Ry. 269; *Aflalo v. Fourdrinier*, 6 Bing. 306; *Wright v. Hunter*, 1 East, 20.

(*u*) *Ex parte Carpenter*, Mont. & Maca. 1.

(*v*) *Ex parte Watson*, Buck. 449;

S. C. 4 Madd. 477; and see *ex parte Taylor*, 2 Rose, 175; and the observation of Sir G. Rose, in *ex parte Adams*, 3 Mont. & Ay. 157.

(*w*) *Vansandau v. Corsbie*, *supra*; *Brind v. Bacon*, 5 Taunt. 183.

(*x*) *Butcher v. Churchill*, 14 Ves. 567.

(*y*) *Ex parte Pring*, 2 Ves. jun. 302 cit.; *Butcher v. Churchill*, *supra*.

interest (*x*). But if the debt is secured by the bond of the principal, and the surety has obtained an assignment of it for his benefit, he may (it would seem) prove to the extent of the penalty, if he has been damnified to that amount (*a*).

The Insolvent Debtors' Act (*b*) discharges the insolvent only from the demands of persons who are *creditors* of the insolvent *at the time of presenting and filing his petition* (*c*); if therefore a surety for an insolvent pays the debt *subsequently* to the insolvent's discharge, the surety may recover from the insolvent the payments so made by him to the creditor; for when the insolvent presented and filed his petition, there was no *debt*, as between the insolvent and the surety (*d*); and it makes no difference (where the payment by the surety is subsequent to the insolvent's discharge), whether the sum, for the payment of which the surety engaged to be answerable, accrued due before (*e*), or after (*f*), the insolvent's discharge.

So where the surety paid after the discharge of the principal under the Lords' Act (*g*), it was held, that the principal was still liable to the surety in respect of such payments (*h*).

It was held, that a surety was not entitled to hold his principal to bail upon an affidavit of debt for *money paid to his use*, where having become surety for his principal before the principal's discharge under an insolvent debtor's act, and having been called upon to pay the money, he had, after the principal's discharge, given the creditor a new

(*e*) *Ex parte Houston*, 2 Glyn & Ja. 36.

(*a*) *Butcher v. Churchill*, *supra*.

(*b*) 7 Geo. 4, c. 57.

(*c*) See sections 10 and 46; and see also 1 & 2 Vict. c. 110, s. 35.

(*d*) *Freeman v. Burgess*, 4 Bing. 416; *S. C.* 1 Moo. & P. 91; *Powell v. Eason*, 8 Bing. 23;

Page v. Bussell, 2 M. & Sel. 551; and see *Hocken v. Browne*, 4 Bing. N. C. 400; *Abbott v. Bruere*, 5 Bing. N. C. 598.

(*e*) *Hocken v. Browne*, *supra*.

(*f*) *Abbott v. Bruere*, *supra*.

(*g*) 32 Geo. 2, c. 28.

(*h*) *Macdonald v. Bovington*, 4 T. R. 825.

security for his debt; notwithstanding the surety swore, that such new security was accepted as payment and satisfaction of the old debt, it not being shown that the principal was a party to the transaction; for to support the action, the debt must have been extinguished, either by an *actual* or a *virtual* payment of money by the surety to the defendant's use (i).

CHAPTER III.

OF THE RIGHTS AND REMEDIES OF THE SURETY, WITH RELATION TO PERSONS CLAIMING UNDER THE PRINCIPAL.

A SURETY to whom his principal has conveyed an estate by way of mortgage, to indemnify the surety in respect of any payments he might be called upon to make in consequence of his having so become surety, is, it would seem, after payment by him of the debt of his principal, where the estate is subject to a prior mortgage, entitled, like other persons who have an interest in the equity of redemption, to redeem the mortgaged estate. And if the surety, after the mortgage is made to him, has been prevailed upon by the principal to become surety for a sum beyond the sum for which the mortgage was originally made to him, the heir of the principal will not, upon bill brought by him for that purpose, be allowed to redeem, except upon payment of what the surety may have paid in respect of both suretyships; upon the equitable rule, that he who asks equity, must do equity (j).

(i) *Taylor v. Higgins*, 3 East, 169; *Maxwell v. Jameson*, 2 B. & Ald. 51, overruling *semble Bar-*

clay v. Gooch, 2 Esp. 571.

(j) *Saint John v. Holford*, 1 Ch. Ca. 97.

Where a tenant for life of lands having a power to charge the same, by mortgage or otherwise, with a sum of money, raises it by way of mortgage, and afterwards on an assignment of the mortgage, the remainder man covenants to pay the mortgage-money, the covenantor will be considered only as a surety for the land, the land being the original debtor, and the next remainder man will be compelled to take the land *cum onere* (k).

The assignees of the principal debtor, who has become bankrupt, are bound by the agreements of the bankrupt made before the principal's bankruptcy; thus, where S. became bound in a bond as surety for P., and P., in order to indemnify S., agreed that he should retain out of any money that should be due from him to P., in respect of any dealings between them in trade, so much as he, S., should pay on the bond, and P. afterwards sold goods to S. of a less value than the money secured by the bond, and then became bankrupt, and S. was obliged to satisfy the bond: it was held, that the payment of the money secured by the bond was a good defence to an action by the assignees of P. against S. for the price of the goods (l). So a factor, who becomes surety for his principal in the course of his dealings, and within his authority as factor, has a lien on the price of the goods sold by him for his principal, to the amount of the sum for which he has so become surety (m). But if a broker, purchasing goods for his principal, does, without his knowledge or authority, add to the terms of purchase which the principal had agreed to, a guarantee by himself of the principal's bills, and the goods are delivered to the broker, and the principal becomes bankrupt,

(k) *Boelyn v. Boelyn*, 2 P. 133.
Wms. 659.

(m) *Drinkwater v. Goodwin*,
(l) *Dobson v. Lockhart*, 5 T. R. Cowp. 251.

the broker can neither detain the goods as upon a stoppage *in transitu*, nor has he any lien on them for the money he has paid on his guarantee; notwithstanding the bankrupt never could have obtained the goods purchased, unless such guarantee had been given (*n*).

Where the surety is appointed executor of his principal, and the testator's assets are *legal* assets, the surety (it would seem) has a right to retain any debt he is liable to pay as such surety, against any debt due from the testator's estate being of *equal degree* (*o*); but if the assets are *equitable* assets, he is not allowed to prefer himself (*p*); all the creditors of the principal being equally entitled, are to be paid *pari passu*, as far as the assets will extend, whether the debts due to them are debts by specialty, or simple contract debts.

Where two became *jointly* bound in a bond, the one as principal, and the other as surety, and the principal having died, the surety administered, and the bond being forfeited, the surety agreed with the creditor and discharged the debt: in debt brought by another creditor of the intestate, it was adjudged that the surety could not retain, for by joining in the bond with the principal, it became his own debt (*q*). It is submitted, however, that in equity the debt would have been thrown on the principal's estate (*2*).

(*n*) *Gurney v. Sharp*, 4 Taunt. 242.

(*q*) *Anon.* Godb. 149, pl. 194; 4 Leon. 236, pl. 373; 11 Vin.

(*o*) See *Anon.* 2 Ch. Ca. 54; *Abr.* 263, pl. 14; 265, pl. 9 & *Silk v. Prime*, 1 Dick. 384.

pl. 10.

(*p*) Last cases.

(2) In the 2nd vol. of Mr. Dickens' Reports, p. 460, there is a case of *Bathurst v. De la Zouch*, the report of which is as follows:—"Bill against an executor for an account. The defendant had become bound with the testator in a bond for another person. The only question was, whether he should be at liberty to retain it out of the testator's estate. Lord Chancellor on a subsequent day determined that the defendant was entitled to retain the whole of what was

A surety who has become responsible for the debt due to one of the creditors of a person who had entered into a composition deed with his creditors, is not, on being sued on his undertaking, entitled *at law* to the production of the composition deed, in the hands of a trustee on behalf of such debtor and his creditors; for the party holding the deed is not a trustee for the surety, but for the parties who executed the composition deed (r).

A surety for a receiver, who has advanced the latter money to enable him to make payments as receiver, is entitled as against the receiver's other creditors, to stand in the place of the receiver, and to be paid sums ordered to the receiver out of funds in court, in respect of disbursements made by him, the money for making such disbursements having been advanced by the surety; for had it not been for the money advanced by the surety, the sum for the benefit of the other creditors would have been lessened to that extent, and it is but just, that upon the application of the surety, he should be indemnified for what he has paid for the receiver out of the balance due to him (s) (3).

Whether a surety, who has paid the specialty

(r) *Cocks v. Nash*, 9 Bing. 723. & B. 134; *S. C. Coop.* 61.

(s) *Glossop v. Harrison*, 3 Ves.

due on the bond." So that it would appear, according to the report of this case (the law of which, however, seems to be rather questionable), that one surety who is the executor of his co-surety, may compel the estate of his co-surety to bear the whole debt, for the payment of which, both the testator and the executor were equally liable.

(3) But a surety for a receiver, whose recognizance has been estreated, and against the former of whom an action has been commenced to recover the money due from the defaulting receiver, will, upon an application made to the Court by the surety, that it may be referred to the Master to see what was due from the receiver, and that upon payment by the surety into the bank by instalments of such sum as should be reported to be due from the receiver, all proceedings in the action at law may be stayed,—have to pay the costs of the motion, and of the subsequent proceedings in consequence of it. (*Walker v. Wild*, 1 Madd. 528.)

debt of his principal, shall stand as a specialty creditor, or as a simple contract creditor, against the assets of the principal, depends upon the circumstance whether there is any continuing security under seal, which can be legally enforced by the surety. If P. and S. give a bond to C., the one as principal, and the other as surety, and no other assurance is executed at the time, and S. pays the money due upon the bond, he thereby becomes a simple contract creditor only of the principal; for the bond being paid off, all remedy upon it is at an end (*t*). But if a mortgage, or counter-bond, be given to the surety by the principal by way of indemnity, the surety will become a specialty creditor or incumbrancer, in respect of what he may pay (*u*); or, if a mortgage have been made by the principal to the creditor, the surety has a right upon payment to stand in the place of the mortgagee, and the mortgagor and those claiming under him, will not be allowed to get back the estate, until the surety has been indemnified (*v*). So where A. and B. as principals, executed a joint and several bond to secure a sum of money to C., and subsequently to the deaths of A. and C., the executors of C. obtained from B. as principal, and from S. as his surety, another bond to secure a part of the money then due on the original bond with interest, and S. dying, his representatives paid off the second bond, and procured the original bond to be assigned to them: it was held, in a suit to administer the estate of A., that S.'s representatives were entitled by virtue of the assignment to rank as

(*t*) *Copis v. Middleton*, T. & Russ. 224; *Gammon v. Stone*, 1 Ves. 339; *Woffington v. Sparks*, 2 Ves. 569.

(*u*) See *Copis v. Middleton*,

supra; *Gayner v. Rayner*, T. & Russ. 227, cit.

(*v*) See *supra* and *Copis v. Middleton*, *supra*; *Plumbe v. Sanday*, 1 Madd. Ch. p. 236, 2nd ed.

specialty creditors of A.'s estate, in respect of the payments made by S. or his estate on the second bond, to the extent of the penalty in the assigned bond (*w*). So where a person, having been appointed a receiver of certain estates during the minority of an infant, joined with two other persons as his sureties in a recognizance for his duly accounting, and afterwards the receiver settled a part of his lands in jointure upon his wife before marriage, and without notice of the recognizance, and then by will devised away the rest of his lands; the recognizance having been put in suit against the sureties, after the receiver's death, it was held, that they were entitled to have the personal estate of the receiver first applied to satisfy the recognizance, then the lands devised, then the lands settled by the receiver as a jointure on his wife, and lastly the paraphernalia of the wife (*x*).



CHAPTER IV.

OF THE RIGHTS AND REMEDIES OF SURETIES, WITH
RELATION TO EACH OTHER; OR THE RIGHT TO
CONTRIBUTION.

- I. Of the principle of contribution;
- II. To what contribution extends;
- III. When the right to contribution is lost, or affected; and
- IV. The remedies for enforcing contribution.

I. Of the principle of contribution.

Where two or more persons become engaged as

(*w*) *Hodgson v. Shaw*, 3 Myl. & K. 183.

(*x*) *Tynt v. Tynt*, 2 P. Wms. 542; S. C. 20 Vin. Abr. 105, pl. 1.

sureties, for the payment to the creditor of the debt of the principal, and the creditor calls upon either of the sureties to pay the principal debt, the surety paying the debt has a right to call upon his co-surety or co-sureties to contribute to the debt equally with himself (*y*): and this doctrine does not spring from contract, but is bottomed and fixed on general principles of equity and justice (*z*), since it would be against equity to permit the creditor to exact or receive payment from one surety, and to permit, or by his conduct to cause, the other sureties who had become equally liable with the one called upon to pay, to be exempt from payment; for although the creditor has the power to resort to either of the sureties for the whole debt, or to each for his proportion, he is not permitted from partiality to one surety, to enforce his right to the prejudice of the others.

And one surety may compel another to contribute to the debt for which they are bound jointly (*a*), or severally (*b*), or jointly and severally (*c*); or whether by the same (*d*), or distinct instruments (*e*), (if

(*y*) *Stirling v. Forrester*, 3 Bli. 575; *Deering v. The Earl of Winchelsea*, 2 Bos. & P. 270; *Lay v. Nelson*, 1 Vern. 456; *Fleetwood v. Charnock*, Nels. 10; *Lawson v. Wright*, 1 Cox, 275; *Morgan v. Seymour*, 1 Ch. Rep. 120; and see *Ware v. Horwood*, 14 Ves. 34; *Craythorne v. Swinburne*, 14 Ves. 160.

(*z*) *Deering v. The Earl of Winchelsea*, *supra*; and see *Stirling v. Forrester*, *supra*; and the observations of Lord Eldon, C., in *Craythorne v. Swinburne*, *supra*; and of Hart, L. C., in *Hartley v. O'Flaherty*, 1 Beat. 78; and of Sir Thomas Plumer, M. R., in *Stone v. Yea*, Jac. 426.

(*a*) *Deering v. The Earl of Win-*

chelsea, 2 Bos. & P. 270; *Fleetwood v. Charnock*, Nels. 10.

(*b*) *Deering v. The Earl of Winchelsea*, *supra*.

(*c*) *Deering v. The Earl of Winchelsea*, *supra*; *Dunn v. Slee*, 1 J. B. Moo. 2; *S. C.* Holt. N. P. C. 399; *Clements v. Langley*, 5 B. & Ad. 372; and see the judgment of Lord Eldon, C., in *Underhill v. Horwood*, 10 Ves. 226.

(*d*) See *Craythorne v. Swinburne*, 14 Ves. 160; and *Clements v. Langley*, *supra*.

(*e*) *Deering v. The Earl of Winchelsea*, 2 Bos. & P. 270; *Mayhew v. Crickett*, 2 Swanst. 185; *S. C.* 1 Wils. C. C. 418; *Stirling v. Forrester*, 3 Bli. 575; and see *Ware v. Horwood*, 14 Ves. 34.

they be not separate and distinct transactions (*f*):) or even where the surety claiming contribution had not, at the time he became surety, any knowledge of the fact, that the surety called upon to contribute had likewise become surety for the principal debtor (*g*). In every one of these cases, sureties have a common interest, and a common burden; they are bound as effectually *quoad* contribution, as if bound in one instrument, with this difference only, that the sum in each instrument (where the liability is fixed in the instrument at a definite amount), ascertains the proportion to which each is liable: whereas, if they are all joined in the same engagement, they must all contribute equally (*h*).

And this principle is carried so far in equity, that if one of several sureties in a joint obligation become insolvent, contribution in respect of his share may be recovered against the solvent sureties, by the surety paying the debt (*i*), though at law, the aliquot part of the whole can only be recovered, regard being had to the number of co-sureties; thus, if three sureties have become responsible for the payment by the principal of the sum of 300*l.*, and one become insolvent, the surety paying the whole debt can, as against the solvent surety, recover *at law*, only the sum of 100*l.* (*j*), whereas *in equity*, the solvent surety would be compelled to contribute a full moiety (*k*).

But this principle of equity may be *qualified* by the contract of the parties; as where three became bound for the principal debtor in an obligation, and agreed

(*f*) *Coope v. Twynam*, T. & Russ. 426; *Stirling v. Forrester*, *supra*.

(*g*) See *Craythorne v. Swinburne*, *supra*.

(*h*) *Deering v. The Earl of Winchelsea*, 2 Bos. & P. 270.

(*i*) *Peter v. Rich*, 1 Ch. Rep. 34; *Hole v. Harrison*, Rep. temp.

Finch, 15, 203; S. C. 1 Ch. Ca. 246.

(*j*) *Cowell v. Edwards*, 2 Bos. & P. 268; *Browne v. Lee*, 6 B. & Cress. 689.

(*k*) *Peter v. Rich*, 1 Ch. Rep. 34; and see *Deering v. The Earl of Winchelsea*, 2 Bos. & P. 270.

among themselves, that if the principal debtor failed to pay the debt, they would pay *their respective parts*: two proved insolvent, and the third paid the money, and one of the insolvent sureties becoming afterwards solvent, he was compelled to pay a third only (*l*). So where one who was indebted to the amount of 1200*l.*, being pressed for payment, gave to his creditor three bonds, each to secure the sum of 400*l.* and interest, payable at different periods, to each of which bonds the debtor procured a different person to join him as a surety; the sureties, though bound for an equal portion of a debt due from the same principal, were held to have entered into a separate and distinct transaction, and not, as between themselves, to be entitled to contribution (*m*) (*4*). In like manner, where several sureties become bound for the same individual, in different obligations, and in different penalties (*n*), or where the subject-matter of the security is joint, but each surety binds himself in a several and distinct penalty (*o*); the penalties in the bond ascertain the proportions in which they are to contribute, though all are equally liable to the obligee, to the extent of the penalty of the bonds when they are not all exhausted.

And a person may by his engagement *take himself altogether out of the reach of the principle*; as where one engages to pay the debt of the principal, in default of payment by him, or either of those

(*l*) *Swain v. Wall*, 1 Ch. Rep. 149; and see *Craythorne v. Swinburne*, 14 Ves. 160.

(*m*) *Coope v. Twynam*, T. & Russ. 426.

(*n*) *Deering v. The Earl of Winchelsea*, 2 Bos. & P. 270; but see *Coope v. Twynam*, *supra*.

(*o*) *Collins v. Prosser*, 1 B. & Cress. 682.

(4) "These cases of sureties," Lord Eldon observes in *Coope v. Twynam*, "depend upon nice distinctions in point of fact." The distinction turning, as it would seem, upon the question, whether the transaction is the same, or a distinct transaction. In the above case of *Coope v. Twynam*, it is to be observed, that the sums for the payment of which the sureties had become responsible, were payable at *different periods*.

persons, who had previously become bound for the due payment by the principal of the debt due to the creditor; the previous sureties are, with reference to the person so contracting, to be considered as principals (*p*). Upon the same principle, it has been determined, that if one person be induced, at the request of another, to become a joint surety with such latter person, for the payment of the debt of a third person, and the person making such request be called upon to pay, and pay the whole debt, he cannot call upon the party to contribute, who had entered into the security at such request (*q*). Still less shall the party be compelled to contribute, who, in addition to the circumstance of his having been requested to join as a surety, entered into the security under a promise of indemnity (*r*).

A surety, who has been proceeded against by the creditor, has no claim for contribution against any of his co-sureties who have been released or compounded with by the creditor, until the surety thus proceeded against shall have paid a sum exceeding the proportion for which he was originally liable; as if A. and B. had become responsible for the payment by P. to his creditor of the sum of 200*l.*, and A. had been released by the creditor, B. must have paid a sum exceeding 100*l.*, before he has a right to proceed against A. for contribution (*s*).

II. To what contribution extends.

A surety, paying and seeking contribution, shall not have interest from his co-sureties upon the money paid or any part of it (*t*), though the debt which such surety was compelled to pay, and for

(*p*) *Craythorne v. Swinburne*, 14 Ves. 160; overruling *Cooke v. Freeman*, 2 Freem. 97; *S. C.* 2 Eq. Ca. Ab. 223, pl. 1; and see *Swain v. Wall*, 1 Ch. Rep. 149.

(*q*) *Turner v. Davies*, 2 Esp. 478.

(*r*) See *Thomas v. Cook*, 8 B.

& Cress. 728; and *Turner v. Davies*, *supra*.

(*s*) *Ex parte Gifford*, 6 Ves. 805.

(*t*) *Onge v. Truelock*, 2 Moll. 31; *Bell v. Free*, 1 Swanst. 90; but see *Swain v. Wall*, 1 Ch. Rep. 149.

the payment of which, the other sureties were equally liable with himself, was a debt by specialty ; for as a surety in a bond paying it off in the lifetime of his principal, becomes only a simple contract creditor of the principal (*u*), and as such, would not be entitled to receive interest in respect of such payment, it would be less equitable under the principle on which equity acts in decreeing contribution, to allow the surety to call for interest as against his co-sureties (*v*).

In a case where two persons had become responsible for the payment of an annuity to a third party, and one of the responsible persons for the payment of the annuity had received from the other of them a covenant, indemnifying him against all actions, suits, costs, charges, *damages*, demands, sums of money and expenses, which might be incurred by reason of the nonpayment of the annuity by the covenantor ; a covenant to pay interest on the payments which the covenantee had made in respect of the annuity, was not, in equity, implied, though under the terms of the covenant of indemnity, interest might have been given by a jury in the form of damages(*w*). And where two persons became jointly and severally bound for the payment of a certain sum of money and interest, and one received from the other a counter-bond, which was conditioned to save harmless and keep indemnified the latter obligee, his heirs, executors and administrators, from the payment of the sum and interest, for which the two had become responsible, and from all costs, charges, *damages*, and expenses, which he or they might sustain on account of the nonpayment of the same, and the obligee in the second bond was afterwards called upon to pay, and paid a sum in respect

(*u*) *Copis v. Middleton*, T. & Russ. 224.

(*v*) *Onge v. Truelock*, 2 Moll. 31.

(*w*) *Bell v. Free*, 1 Swanst. 90 ; and see *Rigby v. M'Namara*, 2 Cox, 415.

of principal, and a further sum in respect of the arrears of interest, such obligee was allowed interest only on the sum paid on account of the principal money due upon the bond, but not on the payments made on account of interest (*x*); for as the obligee in the first bond, could not have claimed against the obligor's interest on the interest due, so neither could the obligee in the second bond, claim more against *his obligor*, than the original obligee could have done, though it is difficult to contend, that the estate of the second obligee would be fully indemnified, without allowing interest on all sums paid by such obligee, whether for principal or for interest.

Nor can a surety claim contribution from his co-sureties, for the costs of defending an action brought against him by the creditor (*y*), unless the co-sureties had authorized him to defend the action (*z*); for the surety, upon being applied to by the creditor, and having no defence, should have paid the debt demanded of him, by which the costs would not have been incurred: but it seems he would be entitled to a proportion of the costs of the writ (*a*).

Nor can a surety claim the costs of defending an action by the creditor, merely because he had received an indemnity from his co-sureties (*b*).

III. When the right to contribution is lost, or affected.

The demand which a surety has against his co-sureties for contribution, after payment to the creditor of the principal debt, should be prosecuted

(*x*) *Rigby v. M'Namara, supra.*

(*y*) *Gillet v. Rippon, Mood. & M. 406; Knight v. Hughes, Mood. & M. 247; S. C. 3 Car. & P. 467; and see Roach v. Thompson, Mood. & M. 487; and Bleaden v. Charles,*

7 Bing. 246.

(*z*) *Knight v. Hughes, supra.*

(*a*) *Gillet v. Rippon, Mood. & M. 406.*

(*b*) *Gillet v. Rippon, supra.*

within the same time as a simple contract debt, or it will be barred by the Statute of Limitations (c).

Where a suit has been instituted for contribution, if during the interval between filing the bill, and procuring the decree, any of the funds of the principal, or of the sureties, should have been lost, on account of the laches of the plaintiff in not having prosecuted his suit with proper effect, it seems that his claim for contribution would be affected to the extent to which the sureties, against whom relief is sought, may have suffered in consequence of such laches or neglect (d). But after a decree has been pronounced, no objection can be made on the ground of laches, since all parties are equally capable of prosecuting the suit (e).

A co-surety who has paid the debt will not be deprived of his right to contribution as against the others, although in a *moral* point of view, he might have been the cause of the loss, which had fallen upon the sureties; as where he encouraged the principal in irregularities, and particularly in gaming, which had ruined him, and had done this, knowing the principal's fortune to be such, that he could not support himself in his extravagancies, and faithfully account for the monies received by him, and for which the sureties had become responsible; for in order to work a disability in such co-surety, to support his demand for contribution, general depravity is not sufficient, it must be pointed to the act upon which the loss arises, and must be in a *legal* sense the cause of the loss (f).

Nor is a surety in a bond deprived of his right to contribution against his co-sureties, in a case where the surety, who having been called upon to pay,

(c) 21 Jac. 1, c. 16.

(d) See the observations of Lord Chancellor Hart, in *Onge v. Truelock*, 2 Moll. 31.

(e) *Onge v. Truelock*, *supra*.

(f) *Deering v. The Earl of Winchelsea*, 2 Bos. & P. 270; S. C. 1 Cox, 318.

discharges the bond, in which he and his co-sureties were bound, with money borrowed upon the credit of his own personal security (*g*); or where, before he had so paid the money, time for payment had been given to him, at his request, by the creditor, without the knowledge of his co-sureties (*h*).

A surety's right to contribution against a co-surety, who has become bankrupt and obtained his certificate, depends upon the question, whether at the time of the bankruptcy there was any debt due from the bankrupt surety to his co-surety, in respect of which, the latter could have proved under the fiat: if there were such a debt, and the co-surety omit to prove it, and the bankrupt surety obtain his certificate, the co-surety's right to contribution is lost (*i*). The 52nd section of the late statute 6 Geo. 4, c. 16, has been held not to extend to a case between two sureties (*j*), so that if one surety become bankrupt, and after the bankruptcy, another surety be called upon by the creditor, and pay the debt, the co-surety paying has a demand for contribution against the bankrupt surety, although such bankrupt surety may have obtained his certificate (*k*): and the surety paying is not deprived of this right in a case where the sureties, together with the principal, bound themselves jointly and severally in a bond in a penalty, and a forfeiture had accrued previously to the bankruptcy of the surety (*l*); for *non constat* the sureties would ever be called upon to pay any thing.

IV. The remedies for enforcing contribution.

The remedy for enforcing contribution, is either—

(*g*) *Swain v. Wall*, 1 Ch. Rep. 774; *Browne v. Lee*, 6 B. & Cress. 149. 689.

(*h*) *Dunn v. Slee*, Holt, N. P. C. 399; S. C. 1 J. B. Moo. 2.

(*i*) *Clements v. Langley*, 5 B. & Ad. 372; *ex parte Porter*, 2 Mont. & Ay. 281; S. C. 4 Deac. & Ch.

(*j*) *Ex parte Porter*, *supra*; *Clements v. Langley*, *supra*.

(*k*) *Clements v. Langley*, *supra*; *Browne v. Lee*, *supra*.

(*l*) *Clements v. Langley*, *supra*.

1st. By action at law ; or—

2ndly. By bill in equity.

1st. Contribution by action at law, is a modern proceeding (*m*) (5), and is only adapted to a case which is simple and uncomplicated (*n*), for where there are several sureties, separate actions must be brought against each individual, by the one who has paid the debt, to which they ought all to contribute (*o*).

The principle upon which contribution at law is founded, is, that one pays that to which all are liable; if therefore any of the co-sureties become insolvent, only an aliquot part of the whole, regard being had to the number of co-sureties, can be recovered against a solvent co-surety, by a co-surety who has paid the debt (*p*). So if the co-sureties oblige themselves for the payment of the debt of their principal, they must be bound in the same penalty; for where the penalties are distinct, one obligor by the payment of the whole debt, would not have paid any penalty, to which another was liable (*q*).

(*m*) See the observations of Best, J., in *Collins v. Prosser*, 1 B. & Cress. 682; of Lord Eldon, C., in *Craythorne v. Swinburne*, 14 Ves. 160; and of Sir R. P. Arden, M. R., in *Wright v. Hunter*, 5 Ves. 792.

(*n*) Per Lord Eldon, C., in *Craythorne v. Swinburne*, 14 Ves. 160; and see Lord Kenyon's observation in *Birkley v. Presgrave*,

1 East, 220; and Lord Eldon's observation in *The East India Company v. Boddam*, 9 Ves. 464.

(*o*) *Cowell v. Edwards*, 2 Bos. & P. 268; and see *Craythorne v. Swinburne*, 14 Ves. 160; and Lord Eldon's judgment in *Ware v. Horwood*, 14 Ves. 28.

(*p*) *Collins v. Prosser*, 1 B. & Cress. 682.

(*q*) *Collins v. Prosser*, *supra*.

(5) It seems that contribution at law, was formerly not allowed. In *Wormleighton and Hunter's case*, reported in Godb. 243, two men were bound with J. S., as sureties in an obligation. One of the sureties was sued upon the bond, and the whole penalty recovered against him. He exhibited an English bill in the Court of Requests against the defendant (being the other surety), to have contribution, and it was moved to the Court for a prohibition to the Court of Requests, and the same was granted; because (as it is there stated), by entering into the obligation, it became the debt of each of them, jointly and severally, and the obligee had his election to sue which of them he pleased, and take forth execution against him: and the Court said,

2ndly. A bill in equity prevents a multiplicity of actions (*r*), and is necessary where the surety desires a discovery for the purpose of ascertaining who are the co-sureties (*s*), and by what instruments they became responsible (*t*), and to what amount (*u*), with a view to contribution:—or where great intricacy in the accounts exists, which requires that they should be unravelled in a court of equity (*v*):—or where there is a difficulty in ascertaining the quantum of contribution, which each surety is to contribute (*w*):—or where the subject-matter of the security is joint, but each of the sureties is bound in distinct, and several penalties (*x*):—or where any of the co-sureties have become insolvent, and the solvent co-sureties are required to contribute rateably to the payment of the whole debt (*y*).

Where a decree is made against sureties, for the payment of the debt of the principal, leave will be given to the defendants the sureties, to prosecute the decree against each other for contribution, if any should be forced to pay more than his proportionate part (*z*).

(*r*) Per Lord Eldon, C., in *Craythorne v. Swinburne*, 14 Ves. 160; and per Sir R. P. Arden, M. R., in *Wright v. Hunter*, 5 Ves. 792; and see *Cowell v. Edwards*, 2 Bos. & P. 268; and Lord Eldon's observations in *Underhill v. Horwood*, 10 Ves. 209.

(*s*) *Craythorne v. Swinburne*, *supra*.

(*t*) *Craythorne v. Swinburne*, *supra*.

(*u*) *Craythorne v. Swinburne*, *supra*.

(*v*) *Craythorne v. Swinburne*, *supra*.

(*w*) See the observation of Lawrence, J., in *Birkley v. Presgrave*, 1 East, 220.

(*x*) *Collins v. Prosser*, 1 B. & Cress. 682.

(*y*) *Peter v. Rich*, 1 Ch. Rep. 34; *Hole v. Harrison*, 1 Ch. Ca. 246; and see *Cowell v. Edwards*, 2 Bos. & P. 268; *Browne v. Lee*, 6 B. & Cress. 689.

(*z*) *Greenside v. Benson*, 3 Atk. 253, *in notis*.

that if one should have contribution against the other, it would be a great cause of suits, and therefore the prohibition was awarded; and so it was said it was lately adjudged and granted, in the like case, in *Sir Wm. Whorwood's case*.

CHAPTER V.

OF THE SURETY'S DISCHARGE.

A SURETY may be discharged from his liability, I. by the act of the parties ; or II. by operation of law.

I. Of his discharge by the act of the parties.

A surety may be discharged from his contract, when any liability has been incurred under it, by payment, or satisfaction, either by the principal, or the surety :—or where no liability has been incurred (and when the nature of the engagement permits it), by the determination of the contract by the principal or the surety (*a*) :—or by a release in law from the creditor, or party to whom the guarantee has been given :—or by acts done by the creditor, without the surety's knowledge and consent, which may be prejudicial to the surety's rights and interests.

Of these modes of determining the surety's liability, it will be sufficient simply to draw the reader's attention, 1st, To the law as to the application or appropriation of payments made by the principal to the creditor ; and 2ndly, To the law as to acts done by the creditor without the surety's sanction, which may operate to the entire, or partial, discharge of the surety.

1st. Of the application or appropriation of payments, made by the principal to the creditor.

The surety may be liable with his principal to the creditor on one account, and the principal may at the same time be liable to the creditor on

(*a*) See *ante*, pp. 41 & 52.

his own individual responsibility on another account : under these circumstances, questions may arise as to the application or appropriation of payments made by the principal to the creditor.

The general rule applicable to payments, seems to be this : if several debts be due from a person, and the debtor pay money to his creditor, the debtor has a right to appropriate the payments to the discharge of any one or other of those debts. *Solvitur ad modum solventis*. If no specific appropriation be made, or can be inferred to have been made, at the time of payment, then the right of application devolves upon the party receiving the money. *Solvitur ad modum recipientis*. If no appropriation be made by either party, then the payment must be applied as the law directs (*b*).

1. Of the application or appropriation by the principal debtor.

The debtor may, at the time he pays the money, declare to what account the money shall be applied (*c*), but he cannot make the application afterwards (*d*).

A party was indebted to his creditor by specialty, and also on simple contract, and having paid sums to his creditor generally, the debtor enters them in his book as paid on account of what was due by specialty: it was held, that the entries in the debtor's book were not sufficient to make the application (*e*). If, however, a surety guarantee a person against debts to be contracted by his principal not exceeding a certain amount, and the creditor give

(*b*) See the judgments of Sir L. Shadwell, V. C., in *Bradly v. Heath*, 3 Sim. 543; and of Sir N. Tindal, C. J., in *Mills v. Fowkes*, 5 Bing. N. C. 455; and see cases *infra*.

(*c*) *Wilkinson v. Sterne*, 9 Mod. 427; *Manning v. Westerne*, 2

Vern. 606; S. C. Eq. Ca. Ab. 147, pl. 2; *Peters v. Anderson*, 5 Taunt. 596.

(*d*) *Wilkinson v. Sterne*, *supra*.

(*e*) *Manning v. Westerne*, 2 Vern. 606; S. C. Eq. Ca. Ab. 147, pl. 2.

the principal credit beyond that amount, and the principal becoming embarrassed, assign all his effects to trustees for the payment of his creditors *pro rata*, the payment by the trustees of a dividend upon the whole amount of the creditor's debt, is a specified appropriation of payment to each and every part of the demand, and the creditor is not justified in deducting the whole sum received, as a dividend from the gross amount of the debt, and holding the surety liable on the guarantee for the residue of the demand up to the extent of the guarantee, but the dividend received by the creditor is to be applied rateably to the whole debt, as well the part covered by the guarantee, as the part which is left uncovered, and consequently a rateable deduction is to be made for the sum covered by the guarantee (*f*) (6). So where P. was indebted to C. by bond, in which S. was bound as his surety, and was also indebted to C. by simple contract, and P. and C. came to a stated account for all monies owing to C. as well for what was due on the bond, in which S. was bound as surety, as for what was due to C. upon simple contract, and P. makes C. a bill of sale towards satisfaction of the whole debt; the money raised by the bill of sale shall be applied proportionably, as well for the sinking of the debt for which S. stood bound, as towards payment in proportion of the debt due on simple contract: inasmuch as both debts had been cast into one stated account, and the bill of sale made towards satisfaction of the whole debt (*g*).

If a specified appropriation have been made by the debtor, it is not in the power of the creditor to vary or alter such appropriation: if the creditor receive

(*f*) *Bardwell v. Lydall*, 7 Bing. 489; *Payley v. Field*, 12 Ves. 435. (*g*) *Perris v. Roberts*, 1 Vern. 34; *S. C.* 2 Ch. Ca. 83.

(6) The same rule applies in bankruptcy (*ex parte Rushforth*, 10 Ves. 409).

the payment, it must be upon such terms as the debtor will pay it, however improper the application may be (*h*): the payment by the principal binds the surety, the latter having no control whatever as to the way in which the principal thinks proper to make his payments (*i*); thus, where P., who had been appointed a tax-collector, entered into a bond with S. as his surety, for the due and faithful payment to the receiver-general, according to the intent of the Act of Parliament under which he had been appointed, of all monies collected by P. upon the days and at the times appointed by the Act, and the sums received by the tax-collector for the service of the year during which S. was his surety, were, as to part, paid over by him to the receiver-general to the service of that year, and the residue of the sums so received, were paid by P. to the service of former years, during which time P. had also been tax-collector, but S. had not been his surety during those former years, it was held, that the payments by the tax-collector for the year for which S. was his surety, to the account of different years, was a breach of the condition for due payment, and that S. was liable for the amount of such payments, and that the receiver-general was justified in applying the money according to the express directions of the tax-collector, though some of those payments went in exoneration of the sureties for former years (*j*).

But the application by the debtor, need not be expressed in terms; it is sufficient if it can be col-

(*h*) *Gwynne v. Burnell*, 2 Bing. N. C. 7; *Bois v. Cranfield*, 16 Vin. Abr. 277, tit. "payment," M. pl. 1; *S. C. Sty.* 239; *Anon.* Cro. Eliz. 68; and see the observation of Lord King, C., in *Colt v. Nettervill*, 2 P. Wms. 304.

(*i*) *Saunders v. Taylor*, 9 B. &

Cress. 35; and see *Williams v. Rawlinson*, 3 Bing. 71; *S. C.* 10 J. B. Moo. 362; *S. C.* 1 Ry. & M. 233.

(*j*) *Collins v. Gwynne*, 9 Bing. 544; *Gwynne v. Burnell*, 2 Bing. N. C., 7.

lected from the nature of the transaction between the parties, that the debtor intended at the time of payment, to appropriate the money paid to one account, specifically (*k*); thus, where A. having large demands against D. upon bill transactions with himself, and also as agent for several persons to whom D. had granted annuities secured by S., caused an attorney to make application to D. and S., *on behalf of those annuitants*, and D., in consequence of that application, and the remonstrances of S. the surety, paid to A. certain sums of money, without making any specific appropriation of them at the time of payment: it was held, that A. must be considered as having received them on account of the annuitants, and that the surety for the due payment to the annuitants of their annuities, was entitled to have those monies divided among the annuitants in proportion to the amount of their respective demands (*l*). So where D. being indebted to his bankers, deposited with them the promissory note of his brother-in-law as a security for the money due to them, but previous to its becoming due, informed the bankers that it was an accommodation note, and requested them to hold it over for sometime, until a demand of his with other persons was settled, to which the bankers consented, and on the day the note became due, D. paid in *generally* a sum of money, leaving a balance due to the bankers considerably less than the sum due on the note: D. shortly afterwards becoming insolvent, it was held, that the bankers could not make the maker of the note responsible *for more than the balance remaining due at the time of such payment*, although they after-

(*k*) *Shaw v. Picton*, 4 B. & Cress. 715; *S. C.* 7 Dowl. & Ry. 201; *Hammersley v. Knowlys*, 2 Esp. 665; *Peters v. Anderson*, 5 Taunt. 596; *Newmarch v. Clay*, 14 East, 240; *Brett v. Marsh*, 1 Vern. 468; *S. C.* 1 Eq. Ca. Ab. 147, pl. 4; *Marryatts v. White*, 2 Stark. 101.

(*l*) *Shaw v. Picton*, 4 B. & Cress. 715; *S. C.* 7 Dowl. & Ry. 201.

wards trusted D. with a further sum of money (*m*). So where a promissory note was given by S., as surety, for flour to be delivered to D. by C., who was a dealer in flour, and at the time the note was given, it was stipulated that it should operate as a security for such goods as should afterwards be delivered, and not for a debt which then existed, and flour had been subsequently delivered, and sums had been paid by the person supplied, and the question was, whether the sums which had been paid, were to be considered as paid in liquidation of the old, or new account: it appeared in evidence, that the usual term of credit upon sales of flour was three months, and that discount was allowed for earlier payments,—that in some instances the payments made by D. were immediate, and corresponding with the exact amount of the goods supplied, and that in others, payments were made before the time of credit had expired, and that discount had been accordingly allowed; and it was held upon this evidence, that a sufficient inference had been afforded, in the absence of proof to the contrary, that the payments were made in relief of the surety (*n*). However, it seems, that in a case where a person is indebted on his individual security, and that a simple contract security, and where he is also indebted to the same creditor by bond, in which S. joins as a surety, and a payment is made *generally* by such debtor, it would not, without some circumstance to show it was intended to be made in discharge of the bond, be so applied, even in favour of the surety, and though it was manifestly for the advantage of the debtor himself, that the payment should be so applied (*o*).

(*m*) *Hammersley v. Knowllys*, 2 Esp. 665.

(*n*) *Marryatts v. White*, 2 Stark. 101.

(*o*) *Manning v. Western*, 2

Vern. 606; *S. C. Eq. Ca. Ab.* 147, pl. 2; and see *Peters v. Anderson*, 5 Taunt. 596; *Plomer v. Long*, 1 Stark. 153; *Tyson v. Coa*, T. & Russ. 395; but see *Heyward v.*

2. Of the application or appropriation by the creditor.

If no application or appropriation, either express or implied, be made by the debtor at the time of payment, the creditor is at liberty to make the appropriation in the way he thinks proper (*p*): he may ascribe his receipt to the discharge of an equitable debt, though a legal debt may be due to him (*q*); or he may apply the payment in discharge of his debtor's separate debt, leaving the security of the principal and his surety untouched (*r*):—or, where one has become responsible for his principal for monies received by him not exceeding a certain sum, and the creditor gives credit to the principal beyond that sum, the creditor may apply a payment made by the principal in discharge of the excess, over and above what the surety was answerable for (*s*):—or, where the creditor has an open cash account with the principal as his banker, the balance of which account is in the principal's favour, and the creditor advances to the principal a sum of

Lomax, 1 Vern. 24; S. C. 1 Eq. Ab. 147, pl. 1 (7).

(*p*) Per Sir James Mansfield, C. J., in *Hutchinson v. Bell*, 1 Taunt. 558; and see *Anon.* 8 Mod. 236; *Hall v. Wood*, 14 East, 243 n.; *Goddard v. Cox*, 2 Stra. 1194; *Tyson v. Cox*, T. & Russ. 395; *Peters v. Anderson*, 5 Taunt. 596; *Bosanquet v. Wray*, 6 Taunt. 597; S. C. 2 Marsh. 319; *Williams v. Rawlinson*, 3 Bing. 71; S. C. 1 Ry. & M. 233; S. C.

10 J. B. Moo. 362; *Manning v. Westerne*, 2 Vern. 606; S. C. Eq. Ca. Ab. 147, pl. 2; *Cruikshanks v. Rose*, 1 M. & Rob. 100; *Philpott v. Jones*, 2 Ad. & Ell. 41.

(*q*) *Bosanquet v. Wray*, 6 Taunt. 597; S. C. 2 Marsh. 319.

(*r*) See the judgment in *Tyson v. Cox*, T. & Russ. 395; and see *Hall v. Wood*, *supra*; and *Peters v. Anderson*, 5 Taunt. 596.

(*s*) *The London Assurance Company v. Buckle*, 4 J. B. Moo. 153.

(7) In *Heyward v. Lomax* it is stated, that where a man owes money on a mortgage, and other monies to the same person on account, for which he is not to pay any interest, and he makes a general payment, without mentioning it to be in discharge of the mortgage, or of the monies due upon the account, it shall be taken to have been paid towards discharge of the money due on the mortgage; because it is natural to suppose that a man would rather elect to pay off the money for which interest was to be paid, than the money due on the account for which no interest is payable.

money on the security of his bond, in which S. joins as his surety, and the principal from time to time makes payments to the creditor, the creditor is not compelled (in the absence of any express, or implied appropriation), to apply those payments in discharge of the bond, but may carry them to the principal's account current, although at the time the payments are made, the balance of the principal's account is then in his favour (*t*):—or, where a surety guarantees the creditor in respect of monies to be advanced to the principal, and at the time the guarantee is given, the principal, unknown to the surety, is indebted to his creditor, the creditor may, nevertheless, apply all subsequent payments made by the principal to the extinction of the old account, and charge the new advances upon the guarantee (*u*), even though the debt, in satisfaction of which the payments are applied, is barred by the Statute of Limitations (*v*).

Nor is the creditor bound to make the application at the time the payment is made by the debtor, it is sufficient if he does so, before an account is settled between them, or action brought (*w*) (8): and even if a creditor enters the payments made to him by the debtor, in books which he keeps for his own private purposes, to one account, he has still the option of applying those payments to another ac-

(*t*) See the judgment in *Tyson v. Cox, T. & Russ.* 395.

(*u*) *Kirby v. The Duke of Marlborough*, 2 M. & Sel. 18.

(*v*) *Mills v. Fowkes*, 5 Bing. N. C. 455.

(*w*) *Simson v. Ingham*, 2 B. &

Cress. 65; *S. C.* 2 Dowl. & Ry. 219; *Wilkinson v. Sterne*, 9 Mod. 427; *Philpott v. Jones*, 2 Ad. & Ell. 41; and see the judgment in *Mills v. Fowkes*, 5 Bing. N. C. 455.

(8) By the civil law, the creditor, as well as the debtor, was bound to make his election at the time of payment; failing to do so, the law applied the payment in discharge of the debt, which it was most for the interest of the debtor to discharge, and if all the debts were equally burdensome, then in discharge of that which had been first contracted.

The reader is referred to the able judgment of Sir Wm. Grant, M. R. in *Clayton's Case* (1 Meriv. 604), for information on this point.

count, provided those entries have not been communicated to the party to be affected by them (*x*): but if the accounts as originally made out, had been settled between the parties (*y*), or if the entries had been made in a book kept for the common use of both the creditor and the debtor, as a pass-book; and that had been communicated to the opposite party (*z*), then, it seems that the creditor will be considered to have made his election, and will be held precluded from making any other appropriation.

3. Where no application or appropriation is made by either party.

If no application or appropriation is made by either party, the law applies the money to the discharge of the several items of the account in the order of their priority, the first item on the debit side of the account being the item discharged or reduced, by the first item on the credit side (*a*); therefore, where S. engages to be answerable for all advances made to P. by C., until the happening of a particular event, and the event happens which puts an end to the surety's engagement, at which time there is due to C., on balance of accounts between him and P., a certain sum of money (*b*); or if P. being indebted to C., S., as P.'s surety, joins him in a bond to C., conditioned for the payment of that sum of money and interest, at a time specified, or upon demand (*c*), and C. subsequently continues to carry on his dealings with P. in the same manner as he used to do, and as if nothing had happened, and makes no rest or distinction in the accounts, and receives from P. in the course of such

(*x*) *Simson v. Ingham*, 2 B. & Cress. 65; *S. C.* 2 Dowl. & Ry. 219.

(*a*) *Clayton's Case*, 1 Meriv. 572.

(*y*) *Bodenham v. Purchas*, 2 B. & Ald. 39.

(*b*) See *supra*.

(*z*) See the observation of Bayley, J., in *Simson v. Ingham*, 2 B.

(*c*) *Walker v. Hardman*, 11 Bli. N. S. 229.

dealings any payments, those payments, if unappropriated by the debtor or creditor, are, in the first instance, to be applied in reduction of the balance due to C. for which the surety was liable, although it may have happened that C. had advanced to P., sums to a greater amount than those he subsequently received from him (*d*). If, however, there are demands recognised by law, and others arising on matters forbidden by law, the law appropriates the payments to the demands which it acknowledges, and not to those which it prohibits (*e*): and it seems that if there is a legal debt, and a demand which can be recovered only by having recourse to a Court of Equity, and no appropriation is made by either party, a court of law will apply the payment to the existing legal demand (*f*).

2ndly. Of acts done by the creditor, which will wholly, or in part, discharge the surety.

Any agreement entered into between the creditor and principal, without the sanction of the surety, which alters the latter's rights or situation, discharges the surety: and if the surety has been once discharged, any agreement subsequently entered into between him and the creditor, in ignorance of that fact, unless such agreement is founded upon some new and good consideration, will be null and void (*g*).

(*d*) *Clayton's Case*, 1 Meriv. 572; *Bodenham v. Purchas*, 2 B. & Ald. 39; *Brooke v. Enderby*, 2 Brod. & B. 70; *Strange v. Lee*, 3 East, 484; *Bellairs v. Ebsworth*, 3 Camp. 53; *Simson v. Cooke*, 1 Bing. 452; S. C. 8 J. B. Moo. 588; *Pemberton v. Oakes*, 4 Russ. 154; see the judgment of Lord Kenyon in *Dawe v. Holdsworth*, Pea. 64; and *Williams v. Rawlinson*, 3 Bing. 71; S. C. 1 Ry. & M. 233; S. C. 10 J. B. Moo. 362; *ex parte Randleson*, 2 Deac. & Ch. 534.

(*e*) *Wright v. Laing*, 3 B. & Cress. 165; S. C. 4 Dowl. & Ry. 783; *ex parte Randleson*, 2 Deac. & Ch. 534.

(*f*) *Birch v. Tebbutt*, 2 Stark. 74; *Goddard v. Hodges*, 1 Cr. & Mees. 33; and see the judgment of Erskine, J., in *Mills v. Fowkes*, 5 Bing. N. C. 455.

(*g*) *West v. Ashdown*, 1 Bing. 164; S. C. 7 J. B. Moo. 566; and see *Cartwright v. Williams*, 2 Stark. 340; *Goodall v. Dolley*, 1 T. R. 712; *Hammon v. Roll*, March, 202.

In the following pages it is proposed to consider, what acts done, or omitted to be done, by the creditor, will wholly, or in part, discharge the surety: and what acts a creditor may do, or omit to do, without prejudicing his rights as against the surety.

1. Where the creditor gives time for payment to the principal.

If the creditor, without the consent of the surety, gives time to the principal (*h*), or enters into any contract with the principal, which in its consequences may have the effect of giving time to him (*i*), by so doing, the surety is released from his engagement; that is, if time is given as an extension of the original contract (*j*), by virtue of a subsequent valid contract between the creditor and the principal (*k*), (not where the creditor is merely inactive (*l*),) by which the creditor deprives himself by something obligatory of the power of suing the principal (*m*). And in equity, an act agreed to be done, being considered as done, an agreement to give time will entitle the surety to be discharged (*n*). And the creditor, if he has by any act assented to the agreement, will be bound by the agreement, although he may not have signed it (*o*).

But in all these cases, time so given must be by

(*h*) *Samuell v. Howarth*, 3 Meriv. 272; *Nisbet v. Smith*, 2 Bro. C. C. 579; *Clarke v. Henty*, 3 You. & Coll. 187; *Rees v. Berrington*, 2 Ves. Jun. 540; *Oakeley v. Pasheller*, 10 Bli. N. S. 548; *Bowsfield v. Turner*, 4 Taunt. 456; *English v. Darley*, 2 Bos. & P. 61; S. C. 3 Esp. 49; *Skip v. Huey*, 9 Mod. 438; S. C. 3 Atk. 91; and see *Eyre v. Bartrop*, 3 Madd. 221; and the observations of Lord Eldon, C., in *Hawkshaw v. Parkins*, 2 Swanst. 539.

(*i*) *Bowmaker v. Moore*, 7 Price, 223.

(*j*) *Combe v. Woolf*, 8 Bing.

156; *Rees v. Berrington*, 2 Ves. Jun. 540; *Nisbet v. Smith*, *supra*; *Skip v. Huey*, *supra*.

(*k*) *Samuell v. Howarth*, *supra*.

(*l*) See *infra*.

(*m*) See the judgment of Gibbs, C. J., in *Orme v. Young, Holt*, N.P. C. 84.

(*n*) See *Hawkshaw v. Parkins*, 2 Swanst. 539; and *Blake v. White*, 1 You. & Coll. 420.

(*o*) See *ex parte Sadler and Jackson*, 15 Ves. 52; *Jolly v. Wallis*, 3 Esp. 228; *Butler v. Rhodes*, 1 Esp. 236; and *Ball v. Dunster-ville*, 4 T. R. 313.

a contract that is binding, and must therefore be for a *sufficient consideration*, as a contract without consideration is void (*p*); thus, where the principal applied to the creditor for indulgence for some months, and the creditor informed him he would give him the time he required; as no fresh security was taken from the principal, the agreement of the creditor to wait was without consideration, and gratuitous, and as under such a contract the creditor was not precluded from proceeding against the principal, the surety was held not discharged (*q*) (9).

(*p*) *Philpot v. Briant*, 4 Bing. 717; *The Arundel Bank v. Goble*, Chit. on Bills, 296; approved in *Philpot v. Briant*; *Brickwood v. Annis*, 5 Taunt. 614; S. C. 1 Marsh. 250; and see *Clarke v.*

Wilson, 3 Mees & W. 208; *Badnall v. Samuel*, 3 Price, 521.

(*q*) *The Arundel Bank v. Goble*, Chit on Bills, 296; and see *Philpot v. Briant*, 4 Bing. 707; S. C. 1 Moo. & P. 754.

(9) In *Heath v. Key* (1 You. & J. 434), a suit was instituted by a surety in a bond, to be relieved from his liability on the ground that the creditors had without the knowledge or consent of the surety given time to the principal. It appeared that the creditors (the persons claiming under the obligees in the bond), had, on the application of the principal, and with the acquiescence of the plaintiff, agreed to extend the time of payment for the space of six months, beyond the time when the money would have become due under the bond, and it was alleged by the plaintiff, that shortly previous to the expiration of the six months, the principal had applied to, and obtained from, the creditors, without the knowledge of the plaintiff, a further extension of six months, in respect of this latter indulgence, the plaintiff claimed to be relieved from his liability.

The plaintiff, in support of his case, and with the view of showing that such second enlargement had been granted to the principal although denied in the answer, relied upon a correspondence which had taken place between the parties, and among which, was a letter from a clerk of the creditors to the plaintiff, as follows:—"We beg leave to remind you that the bond we hold of yours for 500*l.* will fall due on the 27th instant, and that we intend to call upon you on that day for payment of the principal and six months' interest," and accounted for the delay in not having applied to him before that time, by the embarrassment of their own affairs.

The 27th instant referred to in the clerk's letter, was exactly one year after the date, at which, by the condition, the bond was payable; thereby showing, according to the plaintiff's statement, that unless the time had been enlarged, as alleged in the plaintiff's bill, the bond could not have been due at the time mentioned in the letter.

Upon the coming in of the creditor's answer, the plaintiff moved, upon the equity confessed in it, for an injunction, to restrain the de-

So in a case where a creditor told his principal debtor he would accept a composition, if his other creditors would come into it, and he would give him three weeks time to consult them, during which time, the creditors promised not to take any proceedings: it was held, that the agreement was without consideration, and not binding on the creditor, and therefore the surety was not discharged (*r*). So if the agreement to give time is conditional, depending upon the performance of some act to be done by the principal in fulfilment of it, which the latter neglects to do, the agreement thereby becomes inoperative, and leaves the parties in the same situation they were in at the time when they entered into it (*s*) (1).

(*r*) *Brickwood v. Annis*, 5 Taunt. 614; *S. C.* 1 Marsh. 250.

& W. 316; and see *Badnall v. Samuel*, 3 Price, 521.

(*s*) *Vernon v. Turley*, 1 Mees.

defendants (the creditors), from proceeding at law against the plaintiff upon the bond; which motion was refused with costs.

In giving judgment, Alexander, C. B., said, "The whole case turns upon the effect of the letter written by a clerk, during the time the defendants were in embarrassed circumstances, and although he had the opportunity, the plaintiff has not asked whether that letter was seen by either of the defendants before it was transmitted to him. This is not in my opinion a case in which the Court should interfere." And Hullock, B., said, "I am of the same opinion, but confess I feel some difficulty from the letter which I cannot clearly reconcile with the defendant's statement. The clerk however might have mistaken the date of the bond, or the year, but at all events the inference to be drawn from the letter, is not sufficiently strong, under the circumstances, when opposed by the unequivocal denial of the defendants, to warrant the interposition of the Court."

It must not be inferred from this case, that it is not necessary that there should be a consideration for giving time so as to discharge the surety, and I apprehend that even if the creditors had themselves admitted that they had given time to the principal, still it would have been open to them to show, that there was not any *consideration* for the agreement to give time: the question in *Heath v. Key* having been, whether the letter of the clerk amounted to an admission, or evidence, against the creditors, that *time had been given*, and no question as to the want of consideration having been raised.

(1) So an agreement by the creditor to take from the principal, less than the sum that is due to him, accompanied with a promise to

The surety, where time has been given, is held to be discharged for these reasons; that it is his right, upon payment of the debt, to go into a court of equity to demand to sue in the name of the creditor, and if the creditor has given time to the principal, he has put it out of the power of the surety to use the creditor's name with effect, and to enforce immediate payment from the principal, which the

give the principal time for payment of the residue, is *nudum pactum*, and not binding for want of a consideration (*Pinnel's case*, 5 Rep. 117; *Fitch v. Sutton*, 5 East, 230; and see *Steinman v. Magnus*, 11 East, 390; and the judgment of Holroyd, J., in *Lewis v. Jones*, 4 B. & Cress. 506; and see *Cumber v. Wane*, 1 Stra. 426; *Heathcote v. Crookshanks*, 2 T. R. 24; and *Badnall v. Samuel*, 3 Price, 521); for the creditor is in no better situation after the agreement was made, than he was before. But if, at the time of the agreement, the debt is not then due to the creditor, and the creditor agrees to take part at an earlier day, and to give the principal time to pay the remainder (*Pinnel's case*, *supra*); or if, when the debt is due, the creditor agrees to accept the security of a third party, for the payment of the debt, or of any part of it (*Steinman v. Magnus*, *supra*; *Lewis v. Jones*, *supra*; and see *Bradley v. Gregory*, 2 Camp. 383; *Soward v. Palmer*, 2 J. B. Moo. 274); or, to accept a warrant of attorney from the principal, when the debt was originally secured to the creditor, by the bond of the principal and surety, and which therefore would give the creditor a debt of a higher nature (see *Davey v. Prendergrass*, 5 B. & Ad. 187); or, where when the terms of the agreement are, that the principal should assign over certain of his effects to a trustee, in part payment of the debt (see *Heathcote v. Crookshanks*, 2 T. R. 24): in these cases, there is a sufficient consideration to sustain a promise of forbearance by the creditor; provided the agreement is executed on the part of the principal (see *Cranley v. Hillary*, 2 M. & Sel. 120; *Bradley v. Gregory*, 2 Camp. 383); that is, if all has been done by the principal on his part that he engaged to do.

So where the creditor (being one of several creditors) agrees to give the principal time, provided the rest of the creditors would do the same, is a sufficient consideration to support the agreement if subscribed by the other creditors; for the consideration to each creditor is the forbearance of the rest, each party giving the rest reason to believe, that in consequence of such engagement his demand will not be enforced (*Boothbey v. Sowden*, 3 Camp. 174; *Good v. Cheesman*, 2 B. & Ad. 328; and see *Cooling v. Noyes*, 6 T. R. 263; *Heathcote v. Crookshanks*, *supra*). So where the creditor agrees with the principal to receive interest on his debt by anticipation for a limited period, and to grant the principal time for payment of the principal money, there is a sufficient consideration to support the agreement (*Blake v. White*, 1 You. & Coll. 420).

surety has a right to require him to do (*t*); and by postponement, the remedy of the surety against the principal may become more uncertain (*u*).

And the surety will be held discharged, although it be proved that time was given, in consequence of the principal's inability to pay (*v*), or that no injury had accrued (*w*), or even that it was manifestly for the surety's advantage (*x*) (2): the surety himself being the proper judge of, and he alone has the right to determine, what is or is not for his benefit; thus if one be surety by bond for the debt of another payable at a given day, and the obligee take promissory notes payable at a subsequent period (*y*), or a bond conditioned for paying the same debt by instalments (*z*), he thereby discharges the surety.

Upon the above principle, if a guarantee be given

(*t*) *Samuell v. Howarth*, 3 Meriv. 272; *Melville v. Glendinning*, 7 Taunt. 126; and see the observations of Lord Eldon, C., in *The Bank of Ireland v. Beresford*, 6 Dow, 233; of Gibbs, C. J., in *Orme v. Young*, Holt, N. P. C. 84; and of Sir John Leach, M. R., in *Oakeley v. Pasheller*, 10 Bli. N. S. 576 in n.

(*u*) See the judgment of Tindal, C. J., in *Browne v. Carr*, 7 Bing. 508; and see *Combe v. Woolf*, 8 Bing. 156; and the observations of Sir John Leach, M. R., in *Oakeley v. Pasheller*, *supra*.

(*v*) *Samuell v. Howarth*, 3 Meriv. 272.

(*w*) See *Whitaker v. Hall*, 8 Dowl. & Ry. 22; and the obser-

vation of Richards, C. B., in *Bowmaker v. Moore*, 7 Price, 223.

(*x*) See *Boulbee v. Stubbs*, 18 Ves. 20; *ex parte Glendinning*, Buck, 517; *Samuell v. Howarth*, *supra*; *ex parte Wilson*, 11 Ves. 410; and the observations of Sir Anthony Hart, L. C., in *Lord Harborton v. Bennett*, 1 Beat. 386; of Lord Langdale, M. R., in *Calvert v. The London Dock Company*, 2 Keen. 638; and of Lord Eldon, C., in *ex parte Gifford*, 6 Ves. 805.

(*y*) *Rees v. Berrington*, 2 Ves. Jun. 540; *Nisbet v. Smith*, 2 Bro. C. C. 579; *Skip v. Huey*, 3 Atk. 91; S. C. 9 Mod. 438.

(*z*) *Clarke v. Henty*, 3 You. & Coll. 187.

(2) In *ex parte Gifford*, Lord Eldon observes—"Where it is stated in some cases, that it is for the interest of the surety that the compromise should be made, the answer is, those for whose benefit it is alleged to be made, are the proper judges whether it is for their benefit, and it is not to be forced upon them." And again in *ex parte Glendinning*, "It may be said, the surety is not injured by the creditor's arrangement with the debtor, and in many cases the compromise may happen to be extremely advantageous to him: but this is no answer to a surety, who stands upon his contract."

by a surety in general terms, to secure the payment of such goods as the creditor shall supply to the principal, although no period of credit be specified, such a guarantee is not to be taken as a guarantee for an unlimited period, but to be restrained by the usual course of trade, and the principal having accepted bills for the amount of the goods delivered, which the creditor permits him to renew when payable, without any communication to the surety on the subject of such renewal, the surety will be discharged from his guarantee, by virtue of the rule, that a creditor giving time to the principal without the consent of the surety, releases the surety (*a*); thus, where the course of the creditor's business was to give credit for six months, and then to extend the credit by a bill at two months, and the creditor allows three months to elapse after the six months, and then accepts the note of the principal payable at two months (thereby virtually giving a credit of eleven months instead of eight), the surety was held exonerated (*b*). And although it will be presumed that the surety knew the creditor's course of dealing at the time he gave the guarantee (*c*), yet the creditor who sets up the custom of his trade to justify the indulgence given to the principal, in order to withdraw himself from the general principle above stated, will, it seems, not only be bound to prove the custom of his trade, but also to prove that that custom has been uniform and invariable (*d*). But a dealing, though according to the custom of the trade, if at variance with the express language of the guarantee (the guarantee being silent with regard to the custom), will discharge the surety (*e*);

(*a*) *Combe v. Woolf*, 8 Bing. 156; *Samuell v. Howarth*, 3 Meriv. 272.

(*b*) *Combe v. Woolf*, 8 Bing. 156.

(*c*) See *Howell v. Jones*, 1 Cr.

M. & Ros. 97.

(*d*) *Howell v. Jones*, 1 Cr. M. & Ros. 97.

(*e*) *Holl v. Hadley*, 5 Bing. 54; and see *Allan v. Kenning*, 9 Bing. 618.

thus, where a coal merchant had been in the habit of supplying P. with coals, on a credit of two months from the delivery, and being required to furnish coals to an increased amount, had declined to do so without having some security, and accordingly S., as P.'s surety, engaged to pay such sums of money as might thereafter become due to such merchant for coals supplied to P., in case P. should not pay the same within one month after the expiration of the credit of two months. The delivery of the goods to P. was proved to be according to the custom of the trade, which was, that coals were supplied to the dealer daily during the course of a month, and that on the last day of the month the dealer gave a bill at two months for the amount of the coals supplied in the course of that month, so that he had a credit of three months from the delivery of such of the coals as were supplied on the first day of the month, and more than two months' credit for every parcel of coals supplied, except such as might be delivered on the last day of the month. It was urged on behalf of the surety, that a large quantity of the coals might be delivered on the first day of the month, the dealer might be solvent at the end of two months from that day, and insolvent before the expiration of three, so that by extending the credit in this way to three months, the surety's responsibility would be enlarged greatly beyond what he had stipulated for: and the coal-merchant was nonsuited (*f*). In *Simpson v. Manley* (*g*), the question was, whether the credit which had been given to the principal, was within the terms of the guarantee. The guarantee given to the plaintiffs by the defendants, was as follows:—

May 26, 1830.

“ Our relation, Mr. Thomas Manley, having intimated to us that he is about to make some pur-

(*f*) *Holl v. Hadley*, 5 Bing. 54.

(*g*) 2 Cr. & J. 12.

chases of goods from you, we beg to say that if you give him *credit*, we will be responsible that his payments shall be regularly made, to the extent of 1000*l.* from this period, to the 1st of June, 1831 :” it was proved at the trial, that before the guarantee was given, Thomas Manley had dealt with the plaintiffs, at a credit of seventy-three days, and that after the guarantee was given, wishing to extend the credit as much as he could, he proposed to the plaintiffs, and they agreed, that he should have credit until the Saturday following the 73rd day, which happened also not to be the exact credit which was customary in the trade : the defendants were not mercantile men, and were not cognizant of the terms of the prior dealings between Thomas Manley and the plaintiffs ; and it was held, that the word “ *credit*,” meant a fair and reasonable credit, according to terms to be agreed upon, and settled between the parties, and was not intended to be confined to dealings according to the strict customary credit of the trade. And where by the terms of the guarantee six months’ credit was to be given, and the creditors at the time they sent the goods, sent with them a bill of parcels entitled in this way—“ To Messrs. C.” (the creditors), “ at three and three months’ credit,” the surety was held not discharged (*h*).

Where a creditor, whose debt is secured by bond, takes a less rate of interest by anticipation than the rate of interest payable on the bond, the anticipation of such interest in advance amounts to giving time, and will discharge the surety ; since equity would restrain any action by the obligee on the bond, to recover the principal money, until the time had expired for which the obligee had received the interest on the principal money (*i*).

(*h*) *Simmons v. Keating*, 2 Stark. 426.

(*i*) *Blake v. White*, 1 You. & Coll. 420.

The acceptor of a bill of exchange, or the maker of a promissory note, is, as regards all parties to the bill or note, the principal debtor; and the drawer of the bill of exchange, and each indorser of the bill, or note, is in the nature of a surety for the payment of such bill or note by the acceptor or maker: and each subsequent indorser is, as regards a former indorser, the surety for such former indorser: giving time, therefore, by the holder of a bill of exchange, or promissory note, to any of the parties to such bill, or note, without the consent of the subsequent parties, will discharge such parties; thus, if the holder of a bill of exchange, or promissory note, give time to the acceptor, or maker, without the consent of the intermediate parties to the bill, or note (*j*), or allow the acceptor, or maker, to renew it, without consulting the other parties to the bill, or note (*k*), he thereby discharges them from its payment:—or, if after taking part payment from the acceptor of the bill, or maker of the note, he take a new acceptance, or note, from him for the remainder payable at a future day, and agree that in the meantime, the holder shall keep the original bill or note in his hands as a security; such agreement (which is in effect that in the meantime the original bill or note shall not be enforced), amounts to giving time, and a new credit, to the acceptor, or maker, and discharges the parties who were no parties to the agreement (*l*). But where a bill of exchange was drawn by D. upon, and accepted by, A. in favour of I., the payee, who discounted it with his bankers, and

(*j*) *Ex parte Smith*, 3 Bro. C. C. 1; *ex parte Wilson*, 11 Ves. 410; *Gould v. Robson*, 8 East, 576; *English v. Darley*, 2 Bos. & P. 61; S. C. 3 Esp. 49; *Lee v. Levi*, 1 Car. & P. 553; *Hall v. Cole*, 4 Ad. & Ell. 577; and see the observations of Lord Alvanley, C. J., in *Clark v. Devlin*, 3 Bos. & P.

363; and of Lord Eldon, C. J., in *Smith v. Knox*, 3 Esp. 46; and the judgment in *Dunn v. Slee*, Holt, N. P. C. 399.

(*k*) See *Withall v. Masterman*, 2 Camp. 179; and *Tindal v. Brown*, 1 T. R. 167.

(*l*) *Gould v. Robson*, 8 East, 576.

the bill having been dishonoured, the acceptor afterwards transmitted to I. a new bill for a larger amount, but had no communication with him respecting the first, and I. discounted the second bill also with his bankers, who returned to him the first bill, together with the difference between the two, and the first bill was afterwards indorsed to the plaintiff by I., for a valuable consideration; it was held, that the second bill was merely a collateral security, and that the receipt of it by I., did not amount to giving time to the acceptor of the first bill, so as to exonerate the drawer (*m*).

In like manner, if time has been given by the holder to the drawer of the bill, without the knowledge of the indorser, the indorser will be discharged: and so where time has been given to a prior indorser, without the knowledge of a subsequent indorser, the subsequent indorser will be discharged. But giving time to the drawer, or indorser, is no discharge to the acceptor (*n*): nor is any prior indorser discharged, in consequence of time for payment having been given to a subsequent indorser (*o*); unless indeed it was known to the party holding the bill, when time for payment was given by him to the drawer, that the acceptance was an acceptance for accommodation:—or where time for payment was given by him, to a subsequent indorser, that the indorsement of a prior indorser was an indorsement for accommodation; in which case the accommodation acceptor, or indorser, will be held discharged (*p*).

And the surety is discharged, where the creditor

(*m*) *Pring v. Clarkson*, 1 B. & Cress. 14; and see the section "where the creditor receives further security from the principal," *post*.

(*n*) See the judgment of Lord Eldon, C. J., in *English v. Darley*, 3 Esp. 49; and see *Smith v. Knox*, 3 Esp. 46.

(*o*) *Hayling v. Mullhall*, 2 Blk. 1235.

(*p*) See *ex parte Carstairs*, Buck. 560; *Maltby v. Carstairs*, 7 B. & Cress. 735; *Mawson v. Stock*, 6 Ves. 300; *Ashbee v. Pidduck*, 1 Mees. & W. 564; and note, *post*.

takes out execution against the principal and waives it (*q*):—or where having taken out execution, he receives from the principal a sum of money in part payment, and takes his security for the remainder, with the exception of a nominal sum only (*r*); upon the principle, that he is a trustee of his execution for all parties interested in the subject-matter, concerning which such execution has been taken out. But where a *fieri facias* had been sued out against the acceptor of a bill of exchange, and which was afterwards waived, it was held, that the drawer was not thereby discharged; for the rule that an indulgence to an acceptor without the consent of the drawer, discharges such drawer, does not apply after judgment (*s*).

Any indulgence to the principal (which is binding), without the consent of the bail, and which operates to their prejudice, discharges the bail (*t*); thus, if the creditor, having recovered a judgment against the principal, take from him a bill of exchange, to which a surety is a party, for payment of the debt and costs by instalments, the bail are discharged (*u*); for the bail cannot render the principal, if the creditor give the principal time for payment by instalments, until the time when failure is made in payment of an instalment, and the bail are therefore put in a different situation from that in which they placed themselves, when they entered into their recognizance.

So sureties in a replevin bond are released from

(*q*) *Mayhew v. Crickett*, 2 Swanst. 185; S. C. 1 Wils. C. C. 418; and see the judgment of Lord Eldon, C. J., in *Smith v. Knox*, 3 Esp. 47; and *Williams v. Price*, 1 Sim. & S. 581.

(*r*) *English v. Darley*, 2 Bos. & P. 61; S. C. 3 Esp. 49.

(*s*) *Pole v. Ford*, 2 Chit. 125.

(*t*) *Thomas v. Young*, 15 East, 617; *West v. Ashdown*, 1 Bing.

164; S. C. 7 J. B. Moo. 566; *Farmer v. Thorley*, 4 B. & Ald. 91; *Bowfield v. Tower*, 4 Taunt. 456; *Croft v. Johnson*, 5 Taunt. 319; S. C. nom. *Crofts v. Johnson*, 1 Marsh. 59; and see *Melville v. Glendining*, 7 Taunt. 126; *Rea v. The Sheriff of Surrey*, 1 Taunt. 126.

(*u*) *Willis v. Whitaker*, 7 Taunt. 53; S. C. 2 Marsh. 383.

their liability, when, without their privity, the defendant in replevin gives time to the plaintiff in replevin (*v*); for the condition of the bond being an undertaking on the part of the sureties, that the tenant shall prosecute his suit with effect, and without delay, and make return of the goods seized, if so adjudged, the tenant is by such agreement precluded from proceeding according to the condition of the bond, and is restrained, by the act of the landlord, from doing that which his sureties have engaged he shall do, and the bond, therefore, as against the sureties, is *functus officio*.

As the reason for discharging a surety from his liability, when time has been given to the principal debtor, is, that the creditor has done an act by which the surety is (*w*), or may be (*x*), injured, any agreement entered into between the creditor and principal, by which the remedies of the surety are not diminished or affected (*y*), and still less, by which they are accelerated (*z*), as it cannot prejudice the surety, so it shall not discharge him; thus, in a case where sureties became bound in a bond, conditioned to be void if they should, *within one month after demand on them*, pay such balance as should become due to the creditors upon settlement of accounts between them and the principals, and a balance having become due to the creditors, the latter, without communicating to the sureties, took from the principals a warrant of attorney for the amount, with a stay of execution if they should discharge the debt by instalments of a certain sum per

(*v*) *Bowmaker v. Moore*, 3 Price, 214; *S. C.* 7 Price, 223; and see *Archer v. Hale*, 4 Bing. 464; *S. C.* 1 Moo. & P. 285; and the observation of Tindal, C. J., in *Aldridge v. Harper*, 10 Bing. 118.

(*w*) See *ante*, p. 166, *et seq.*

(*x*) And see the observation of Richards, C. B., in *Bowmaker v.*

Moore, 7 Price, 223; and *ante*, p. 167.

(*y*) *Prendergast v. Devey*, 6 Madd. 124.

(*z*) *Hulme v. Coles*, 2 Sim. 12; and see *Stevenson v. Roche*, 9 B. & Cress. 707; *Jay v. Warren*, 1 Car. & P. 532.

month, and that in default, execution might issue for the whole debt: and the first instalment not having been paid, the creditors made a demand on the sureties according to the terms of the bond: it was held by his honor Sir John Leach, V. C., that 'as the sureties' liability did not arise till demand, and before demand default having been actually made by the principal debtors, so that execution might be instantly issued for the whole debt, the agreement made by the warrant of attorney was inoperative, and the sureties were noways injured, as there was nothing to interfere with their having immediate recourse to the principal debtors (*a*). So if a creditor accept from the principal a cognovit in an action he had brought against the principal, with a stay of execution until a day earlier than that on which judgment could have been obtained in the regular course (*b*):—or for paying the debt by instalments, if judgment could not have been had, and execution issued, by the time fixed for payment of the last instalment (*c*):—or if, during the progress of the cause, the creditor agree to give the principal a month's time to pay the debt, and the time so given would expire before judgment could by the practice of the court be obtained (*d*), the surety will not be discharged.

Nor can a surety claim relief, in respect of an arrangement made between the creditor and the principal, which has received the surety's sanction (*e*);—or which having been made without the

(*a*) *Prendergast v. Devey*, 6 Madd. 124; and see *Price v. Edmunds*, 10 B. & Cress. 578.

(*b*) *Hulme v. Coles*, 2 Sim. 12; *Stevenson v. Roche*, 9 B. & Cress. 707; *Stevenson v. Crease*, 4 Man. & Ry. 561; and see *Jay v. Warren*, 1 Car. & P. 532.

(*c*) *Stevenson v. Roche*, 9 B. & Cress. 707.

(*d*) *Whitfield v. Hodges*, 1 Mees. & W. 679.

(*e*) *Clark v. Devlin*, 3 Bos. & P. 363; *Tyson v. Cox*, T. & Russ. 395; *Cowper v. Smith*, 4 Mees. & W. 519; *Winckworth v. Mills*, 2 Esp. 484; *Duffy v. Orr*, 5 Bli. N. S. 620; and see *Cocks v. Nash*, 9 Bing. 723; *Cooling v. Noyes*, 6 T. R. 263; *ex parte Powell*, 2

surety's knowledge, the surety subsequently approves, and confirms (f) (3): but a promise made by the surety in ignorance of the fact of his having been discharged by time having been given to the principal, will not renew the surety's liability (g).

The surety is not entitled to be discharged, in a case where the creditor has been induced to enter into an arrangement under a false representation made to him by the surety, that the creditor's rights against himself would not be injured (h):—nor where the principal, in an interview he had with the surety, stated to him, he had been applied to by the creditor for payment, and the surety told him to see the creditor's solicitors, and do the best he could with him, and the principal afterwards arranged with the solicitors accordingly, and the arrangements were communicated to the surety, who expressed himself perfectly satisfied with them (i):—nor where the holder of a bill of exchange, told the drawer of his intention to take a warrant of attorney from the acceptor, to which the drawer answered, "You may do as you like, for I have had no notice of the non-payment" (but which circumstance was not true); for the reply of the drawer was held to

Mont. & Ay. 533; S. C. 1 Deac. 378; *Lancaster v. Harrison*, 6 Bing. 726; *Clift v. Gye*, 9 B. & Cress. 422; *Charleton v. Morris*, 6 Bing. 427.

(f) *Tyson v. Cox*, *supra*; *Smith v. Winter*, 4 Mees. & W. 454; and see *Duffy v. Orr*, *supra*; *Mayhew v. Crickett*, 2 Swanst. 185;

S. C. 1 Wils. C. C. 418.

(g) See *ante*, p. 166.

(h) See the observation of Tindal, C. J., in *Cocks v. Nash*, 9 Bing. 723; and see *Cooling v. Noyes*, 6 T. R. 263.

(i) *Tyson v. Cox*, T. & Russ. 395.

(3) "If the surety afterwards" (that is, after the surety has been released by time having been given to the principal by the creditor) "make a promise to pay, he cannot object to that, as a promise without consideration: the promise is valid, not as the constitution of a new, but the revival of an old, debt. So when a bankrupt is discharged by his certificate, he cannot, for that reason, impeach a subsequent promise to pay a former debt, as a promise without consideration." Per Lord Eldon, C., in *Mayhew v. Crickett*, (*supra*).

amount to an assent on his part, that the holder should take a warrant of attorney from the acceptor (*j*). But where the holder of a bill of exchange had, at its maturity, allowed the acceptor to renew it without consulting the indorser, from whom the holder received it, and the indorser afterwards met the acceptor, and was told by him that he had taken up his acceptance by another bill, which the indorser approved, and said, "It was the best thing that could be done:" such approval was held to refer to the acceptor of the bill, to whom it was evidently advantageous, and was not deemed a recognition of the act of the holder; and the indorser was held discharged (*k*).

But a creditor may stipulate with the principal for his right to go against the surety, and the surety's liability will remain, notwithstanding the arrangement between the principal and creditor to give the former time (*l*); for the effect of the agreement is to save the right of the creditor to proceed against the surety, who upon paying could immediately recover against the principal; and the principal as against the surety could not insist upon the right to time given to him by the creditor, as there is the contract between the creditor and the principal for reserving the creditor's rights against the surety (*m*)(4): however, it should be noticed, that if time be given by deed to the principal, the reservation of the cre-

(*j*) *Clark v. Devlin*, 3 Bos. & P. 363.

(*k*) *Withall v. Masterman*, 2 Camp. 179.

(*l*) *Ex parte Glendinning*, Buck, 517; *Smith v. Winter*, 4 Mees. & W. 454; and see *Hall v. Hutchons*, 3 Myl. & K. 426; and Lord El-

don's observation in *Boulbee v. Stubbs*, 18 Ves. 20; and *Duffy v. Orr*, 5 Bli. N. S. 620; *ex parte Gifford*, 6 Ves. 805; *ex parte Carstairs*, Buck, 560.

(*m*) *Boulbee v. Stubbs*, 18 Ves. 20.

(4) Lord Eldon, C., in the case of *Boulbee v. Stubbs* (*supra*), observes, that the same doctrine had been held at law, as well as in equity, but a stipulation of the kind referred to, is, in many cases, so very absurd, that it must be seen plainly.

ditor's rights to go against the surety, should be upon the face of the instrument itself; as evidence cannot be admitted to explain, or vary, the effect of the instrument (*n*): and such reservation should be clearly and unequivocally expressed, and not open to any manner of doubt (*o*).

The principle that a surety no longer remains liable to the debt, when a creditor, without giving notice to the surety, gives time of payment to the principal debtor, was first adopted in equity (*p*):

- (*n*) *Ex parte Glendinning*, Buck. N. P. C. 84; and see *Moore v. Bowmaker*, 6 Taunt. 379; *S. C.* 2 Marsh. 81; *Samuell v. Howarth*, 3 Meriv. 272; *Melville v. Glendinning*, 7 Taunt. 126; and *Hawshaw v. Parkins*, 2 Swanst. 539.
- (*o*) *Boulbee v. Stubbs*, 18 Ves. 20 (5).
- (*p*) See the judgment of Gibbs, *C. J.*, in *Orme v. Young*, Holt,

(5) In this case the defendant Stubbs, who was a banker, being unwilling to give his customer Thomas Boulbee credit to the amount he wished upon his own personal security, or upon the credit and security of the different bills and notes which he should pay into the bank in the course of his dealing, required and procured a bond for 10,000*l.* from him and from Thomas Boulbee's brother, Charles Boulbee, as his surety, under which it was stipulated, that Charles Boulbee was to be liable only to the extent of 6,000*l.*, if upon the account, that amount should be due. Upon a subsequent settlement of the accounts, the balance due to the banker appearing to be 9,500*l.*, Thomas Boulbee gave his banker a mortgage for 4,000*l.*, reducing the debt therefore below 6,000*l.*: and it was further agreed between the banker and his customer, that the residue of the 9,500*l.* should be paid by instalments, and a warrant of attorney was given to confess judgment, but expressly "without prejudice to any security Stubbs now holds for the said sum or any part thereof." Charles Boulbee, the surety, filed his bill in equity to be discharged from his liability, and moved for an injunction to restrain the creditor from proceeding against him upon the bond, and Lord Eldon granted the injunction, observing, that the consequence of the transaction which had taken place between the creditor and principal (namely, the security continuing liable for the sum of £5,500 remaining due upon the settlement of accounts, and the creditor agreeing with the principal to postpone his remedy, changing his immediate right to sue to a right to call for certain instalments), was, that in equity the creditor's right against the surety was gone, and the question therefore to be considered was, what was intended by the words in the warrant of attorney "without prejudice to any security," and his lordship was of opinion, that it was not intended by those words to save the bond among other securities, but rather that the principal being in the habit of giving securities to the creditor from time to time, the meaning was, that that transaction should liqui-

courts of law subsequently acted upon the same principle, and applied it to the case of bail (*q*): and now, the same principles which have been held to discharge a surety in equity, will operate to discharge him also at law (*r*). But though the same relief may be obtained in a court of law, as well as in a court of equity, a court of equity will not send a party who is suing there, to a court of law for the discharge to which he is equally entitled in equity (*s*).

In order, however, that the surety may avail himself of a defence at law, it must appear upon the face of the instrument that he is such surety; for if he is bound as principal, he cannot, *at law*, aver by pleading that he is bound as surety (*t*) (6),

(*q*) Stat. 11 Geo. 2, c. 19; *Moore v. Bowmaker*, *supra*.

(*r*) *Samuell v. Howarth*, *supra*; and see the judgment of Best, C. J., in *Philpot v. Briant*, 4 Bing. 717.

(*s*) *Samuell v. Howarth*, 3 Meriv. 272; *Mayhew v. Crickett*, 2 Swanst. 185; *S. C.* 1 Wils. C. C. 418; and see the observation of Lord Eldon, C., in *Hawkshaw v. Parkins*, 2 Swanst. 539.

(*t*) *Per* Lord Loughborough, C., in *Rees v. Berrington*, 2 Ves. Jun. 540; and see *Lewis v. Jones*, 4 B. & Cress. 506; and see the judgment of Abbott, C. J., in *Davey v. Prendergrass*, 5 B. & Ald. 187; and the observations of Bayley, J., in *Pease v. Hirst*, 10 B. & Cress. 122; and of Lord Abinger, C. B., in *Ashbee v. Pidduck*, 1 Mees. & W. 564.

date the matter of the bond, but should not prejudice the banker's right as to other securities in his hands, the saving of which securities would give a reasonable interpretation to those words in the warrant of attorney.

(6) A considerable degree of doubt has been entertained by many learned judges, as to the propriety of Lord Ellenborough's decision in the *Nisi Prius* case of *Laxton v. Peat*, 2 Camp. 185 (see the observations of Sir James Mansfield, in *Raggett v. Azmore*, 4 Taunt. 730; and in *Fentum v. Pooock*, 5 Taunt. 192; *S. C.* 1 Marsh, 14; of Sir Vicary Gibbs, in *Kerrison v. Cooke*, 3 Camp. 362; of Sir James Parke, in *Price v. Edmunds*, 10 B. & Cress. 578; and of Lord Tenterden, in *Yallop v. Ebers*, 1 B. & Ad. 698); in which case the learned judge permitted the acceptor of a bill of exchange to show, that as between himself, the drawer and the holder, the drawer was the principal, and the acceptor merely the surety: and held the acceptor to be entitled to such relief, as a surety may claim, when his remedies have been affected by the creditor without the surety's consent.

From the observations of Sir James Mansfield, C. J., in *Fentum v.*

though, *in equity*, parol evidence is admissible to show who is principal, and who surety (*u*): thus,

(*u*) *Craythorne v. Swinburne*, 14 Ves. 160; *Clarke v. Henty*, 3 You. & Coll. 187; and see Lord Thurlow's judgment in *Clinton v. Hooper*, 1 Ves. Jun. 173; S. C. 3 Bro. C. C. 201.

Pocock (5 Taunt. 192; S. C. 1 Marsh. 14); and of Sir Vicary Gibbs, C. J., in *Carstairs v. Rolleston* (5 Taunt. 551); it would seem, that the point decided in *Laxton v. Peat*, was:—that where the holder of a bill of exchange has, at the time he receives it from the drawer, knowledge that it was accepted without consideration, and solely for the accommodation of the drawer, and afterwards gives time to the drawer without the consent of the acceptor, the holder shall not be permitted to proceed against the acceptor: it being necessarily to be collected, that the understanding between the parties to the bill must be, that the drawer is to be considered the person primarily liable, and in the first instance looked to for payment.

If it is admitted, that the judgment of Lord Ellenborough proceeded upon the ground, that the holder had knowledge of the accommodation acceptance at the time when he took the bill, *without reference to the question, how far giving time to the drawer would have discharged the acceptor, if the holder had not notice at the time when he took the bill, that the bill was accepted for the accommodation of the drawer, but had notice of that fact afterwards, and before he gave time to the drawer*, then, the cases usually referred to, as being opposed to the law as laid down in *Laxton v. Peat*, may perhaps be distinguished from the latter case.

In *Raggett v. Azmore* (4 Taunt. 730), there was no sufficient evidence of the fact, that the bill of exchange was accepted without consideration. In *Kerrison v. Cooke* (3 Camp. 362), it does not appear when the holder had notice, that it was an acceptance for accommodation only. In *Fentum v. Pocock* (5 Taunt. 192; S. C. 1 Marsh. 14), *Carstairs v. Rolleston* (5 Taunt. 551), and *Perfect v. Musgrave* (6 Price, 111), notice, that the transactions were accommodation transactions, was after the bill and notes were respectively received. In *Price v. Edmunds* (10 B. & Cress. 578), the Court determined that no time had been given, and consequently even if it had appeared upon the face of the instrument that the party was surety, he would not have been discharged. In *Yallop v. Ebers* (1 B. & Ad. 698), the question was not between the parties to a bill of exchange (for the defendant was neither acceptor, drawer, nor indorser), but arose upon the defendant's liability, notwithstanding his bankruptcy, to pay the balance due on a bill of exchange according to an undertaking which had been given by him. In *Nicholls v. Norris* (3 B. & Ad. 41 n.), there was a reservation in the deed of composition and release, of the holder's right to go against the maker of the promissory note, and therefore it was immaterial, whether the maker was a surety, or a principal. In *Harrison v. Courtald* (3 B. & Ad. 36), the holder did not know, at the time when he took the bill, that it had been accepted for the accommodation of the drawer.

The reasons which influenced Lord Ellenborough, in coming to the judgment which he delivered, in the case of *Laxton v. Peat*, are stated

if two persons are jointly (*v*), or jointly and severally (*w*), bound to the creditor, the one as princi-

(*v*) See *Ashbee v. Pidduck*, 1 Mees. & W. 564.

(*w*) See *Rees v. Berrington*, 2 Ves. Jun. 540.

by him in *Collet v. Haigh* (3 Camp. 281; a case decided by him two or three years afterwards, and involving the same principle as that in *Laaton v. Peat*); and which are as follow:—"The drawer of an accommodation bill must be considered as the principal debtor, and the acceptor only in the light of a surety. The reason why notice of the dishonour of a bill must in general be given to the drawer, is, that he may recoup himself by withdrawing his effects from the hands of the acceptor, and he is discharged by time being given to the acceptor without his consent, because his remedy over against the acceptor, may thus be materially affected; but where the bill is accepted merely for the accommodation of the drawer, he has no effects to withdraw, and no remedy to pursue when compelled to pay; he therefore suffers no injury, either by want of notice, or by time being given to the acceptor, and in an action on the bill he cannot defend himself upon either of these grounds."

It cannot be doubted that the decision of Lord Ellenborough meets the justice and equity of the case, and there can be as little doubt, that the party who received judgment in his favour in the case of *Laaton v. Peat*, would have obtained relief in a Court of Equity (see the observations of Lord Eldon, C. in *ex parte Glendinning*, Buck, 517; *the Bank of Ireland v. Beresford*, 6 Dow, 233; *ex parte Yonge*, 3 Ves. & B. 31; *S. C. nom. ex parte Young*, 2 Rose, 40): but the question is, ought that relief, under the circumstances stated, to have been granted to the acceptor in a court of law? or, in other words, is it permitted in a court of law, to a person to show, that he stands in a different situation from that in which he is represented by the instrument, and that instead of being (as the party professed to be), the principal, he was in fact merely the surety? (see previous cases, and *Ashbee v. Pidduck*, 1 Mees. & W. 564; *Rawson v. Walker*, 1 Stark. 361; and the observations of Bayley, J., in *Ridout v. Bristow*, 1 Cr. & J. 231; and *Britten v. Webb*, 2 B. & Cress. 483; and of Parke, J., in *Price v. Edmunds*, 10 B. & Cress. 578; and of Lord Loughborough in *Rees v. Berrington*, 2 Ves. Jun. 540).

It seems to be clear, that if an instrument is *strictly* an instrument of suretyship, and a party appears upon it to be bound as principal, he cannot at law plead that he is bound as surety (see cases *supra*): but is a bill of exchange or promissory note, an instrument of this description?—or is it not rather a mercantile instrument, and subject as such, for its construction, to the laws which prevail among merchants?—and not being an instrument under seal,—is it not competent for a court of law to receive parol evidence, showing what the real terms were on which such bill or note was given? (see the judgment of Abbott, C. J., in *Davey v. Prendergrass*, 5 B. & Ald. 187; and *Thompson v. Chubley*, 1 Mees. & W. 212).

Notwithstanding Lord Tenterden, in the case of *Yallop v. Ebers*, is reported to have said, that he considered the case of *Laaton v. Peat*,

pal, and the other as surety, and both appear upon the instrument as principals, such surety obligor, when time has been given to the principal debtor (*x*), or to the representatives of such principal debtor (*y*), may have relief in a court of equity, though he could not at law.

The agreement also by which it is attempted to be shown, that time has been given to the principal, must, *at law*, be as binding as the instrument creating the surety's liability, or it will not avail (*z*); for the general rule of the common law requires,

(*x*) See *Rees v. Berrington*, *supra*.

(*z*) *Davey v. Prendergrass*, 5 B. & Ald. 187; and see *Field v.*

(*y*) See *Ashbee v. Pidduck*, *supra*.

Robins, 8 Ad. & Ell. 90.

to have been long overruled (and which opinion, it is to be observed, is at variance with that expressed in *Davey v. Prendergrass*), yet, a modern case (*Hall v. Wilcox*, 1 M. & Rob. 58), decided by the same learned lord, seems to uphold the doctrine laid down in the case of *Laxton v. Peat*, and to support the opinion formerly, as it would seem, held by Lord Eldon (see *ex parte Glendinning*, Buck, 517; and *the Bank of Ireland v. Beresford*, 6 Dow, 233); that it was competent for the acceptor of a bill of exchange, or the maker of a promissory note, to prove in a court of law, that the bill or note was accepted or made without consideration, and so known to the holder.

The case of *Hall v. Wilcox*, above adverted to, was, as follows:—Assumpsit by the payee against the maker of a promissory note for £50. The note was joint with Honeysett. It was proved on the plaintiff's evidence, that Honeysett, who was a publican, had applied to the plaintiff, a brewer, for a loan of £50, and on the plaintiff's requiring security, the defendant agreed to join with Honeysett in the promissory note. Honeysett after some time fell into difficulties, and the plaintiff took half-a-crown in the pound, as a composition for this and other demands, having arrested him, and discharged him on payment of that sum. The sum paid reduced the plaintiff's demand on the note to £40. It was doubtful on the evidence whether this was not done with the defendant's consent. For the plaintiff it was contended, that the note being a joint note, without any mention of suretyship, the defendant must be considered as a principal:—that he could not be allowed to allege he held any other character than that which he assumed in the note. Lord Tenterden said he was of opinion, that as the note was made and given to the plaintiff, with the knowledge that the defendant was only a surety, the defendant would be discharged; unless the composition was taken with the express consent of the plaintiff. This question was left to the jury, who found a verdict for the defendant (and see *Garrett v. Jull*, Selw. N. P. 377, 7th ed.; and the observations of Abbott, C. J., in *Adams v. Gregg*, 2 Stark. 531).

that the obligation created by an instrument, shall be discharged by an instrument of equal force, *Nihil tam conveniens est naturali Æquitati, unum quodque dissolvi eo ligamine quo ligatum est* (a); and though equity will interfere, and grant relief (b), it is no defence *at law*, to an action against a surety on a bond, or other instrument under seal (c):—or where the cause of action arises upon matter of record, as a *réconnaissance* (d), that by parol agreement time has been given to the principal.

In a case of a replevin bond, however, a court of law is, by the 23rd section of the stat. 11 Geo. 2, c. 19, empowered, *upon an application to the equitable jurisdiction of the Court*, “to give such relief to the parties upon such bond, as may be agreeable to justice and reason” (e).

2. Where the creditor compounds with, or releases, the principal.

The principles which discharge a surety, where time has been given to the principal debtor, apply with equal, if not greater, force, to a case where the creditor, without the consent of the surety, releases the principal, by accepting a composition in discharge of his debt (f). And the creditor's right of

(a) And see *Little v. Holland*, 3 T. R. 590.

(b) *Blake v. White*, 1 You. & Coll. 420; *Bowmaker v. Moore*, 3 Price, 214; S. C. 7 Price, 723; and see *Heath v. Key*, 1 You. & J. 434; *Combe v. Woolfe*, 8 Bing. 156.

(c) *Davey v. Prendergrass*, 5 B. & Ald. 187; *Rees v. Berrington*, 2 Ves. Jun. 540; *Bul teal v. Jarrold*, 8 Price, 467; *Donnelly v. Dunn*, 2 Bos. & P. 45; *Moore v. Bowmaker*, 6 Taunt. 397; S. C. 2 Marsh. 81; *Aldridge v. Harper*, 10 Bing. 118; and see *Little v. Holland*, 3 T. R. 590; *Hayford v. Andrews*, Cro. Eliz. 697; *Field v. Robins*, *supra*; *Cocks v. Nash*, 9

Bing. 341; *Hallett v. Mount Stephen*, 2 Dowl. & Ry. 343; *Woosnam v. Price*, 1 Cr. & Mees. 352; *Ashbee v. Pidduock*, 1 Mees. & W. 564.

(d) *Bul teal v. Jarrold*, 8 Price, 467.

(e) *Archer v. Hale*, 4 Bing. 464; and see the observation of Tindal, C. J., in *Aldridge v. Harper*, 10 Bing. 118.

(f) *Ex parte Wilson*, 11 Ves. 420; *ex parte Smith*, 3 Bro. C. C. 1; *ex parte Glendinning*, Buck, 517; *ex parte Carstairs*, Buck, 560; *English v. Darley*, 2 Bos. & P. 61; *Lewis v. Jones*, 4 B. & Cress. 506; and see *Thompson v. Harrison*, 1 Cox, 344.

proceeding against the surety will equally be destroyed, where for a good and valid consideration, he *agrees* to discharge the principal (*g*).

The rule, however, above referred to, does not apply in a case where the surety has, previously to the release given by the creditor, paid part of the debt and given a security for the remainder (thereby making it his own individual debt): in which case, the creditor, notwithstanding the release, will, in the absence of evidence of an intention to the contrary, retain his right against the surety for the remainder of the debt (*h*).

If the effect of the instrument is to release the surety, it is no sufficient answer to the surety's claim to be discharged (where no fraud has been practised by the surety), that by accepting a composition from the principal, every thing substantially had been done for the benefit of the surety (*i*): or even that the composition originated in a mistake (*j*): thus, where the holder of a bill of exchange, under the belief that the acceptor (who was residing at Hamburgh), had become bankrupt, and that a dividend had been set apart in respect of his bill, had directed his agent to receive the dividend under his supposed bankruptcy, and it proved to be a composition, instead of proceedings in the nature of a commission of bankruptcy, and the agent on the part of his principal signed a deed of composition: it was held sufficient to exclude the holder from going against the other parties to the bill; the consequence of not knowing what the act was, being decreed to fall upon the person who did the act (*k*).

(*g*) See *ante*, p. 167.

(*h*) See *Hall v. Hutchons*, 3 Myl. & K. 426.

(*i*) *Ex parte Smith*, *supra*; *Lewis v. Jones*, 4 B. & Cress. 506; and see *ante*, p. 171.

(*j*) *Ex parte Wilson*, 11 Ves.

420; and see Lord Eldon's judgment in *ex parte Carstairs*, Buck. 560; and *Lewis v. Jones*, 4 B. & Cress. 506.

(*k*) *Ex parte Wilson*, 11 Ves. 420.

So where the holder of a promissory note signed an agreement to accept from the maker 5*s.* in the pound in full of his demand, on having a collateral security for that sum from a third person (which was accordingly given to him), and also upon the faith of representations made to him by the agent of the maker of the note, that notwithstanding the signing of the agreement for composition by the holder, an indorsee (who had indorsed the note for the accommodation of the maker) would continue liable for the residue of the debt secured by the note: it was held, that the execution of the agreement had the effect of discharging the surety, and that the representations made to the holder, being as to the *legal effect* of the instrument which he signed (and which every man is supposed to know), were immaterial, and had not the effect of avoiding it (*l*).

The creditor may, however, when he enters into a composition with the principal, stipulate for the reservation of his remedies against other persons, and those persons will remain liable, though the effect of such reservation may be to defeat the object of the composition itself; as where the creditor has in his hands bills of exchange, accepted by a third party for the accommodation of the principal, sufficient to cover the creditor's debt, over and above the composition money: the creditor by reserving to himself the power of enforcing the security in his hands, may proceed against such accommodation acceptor, who, when he has paid the bills, may go against the principal to recover the money so paid by him, and thus the principal may eventually have to pay 20*s.* in the pound, and derive no benefit from the composition deed: but such a reservation must clearly and distinctly appear upon the face of

(*l*) *Lewis v. Jones*, 4 B. & Cress. 506.

the instrument (*m*). If the instrument of composition be silent as to the securities in the hands of the creditor, and the instrument operate as an extinguishment of the original debt, it puts an end to the agreement between the principal and surety (*n*); and consequently the right of the creditor to proceed against the surety (in all cases where the relation of principal and surety appears upon the security) is gone, as well at law as in equity (7).

It has been settled, that the signature by the creditor of the certificate of the principal, when the latter has become bankrupt, does not discharge the surety, either at law or in equity (*o*); even after notice given by the surety to the creditor, not to sign such certificate, and though the consequence of doing so, is to release the person of the principal from the arrest of the surety, and his future effects from execution (*p*): such an act not ranging itself within those voluntary acts of the creditor which release the surety, and over which the surety has no control, or the injury which he thereby receives being one which he has no mode of preventing; for the surety, upon payment of the debt of his princi-

(*m*) See *ante*, p. 181, *et seq.*

(*n*) *Lewis v. Jones, supra.*

(*o*) *Browne v. Carr*, 2 Russ.
600; *S. C.* 7 Bing. 508; *Langdale*

v. Parry, 2 Dowl. & Ry. 337;
and see *ante*, p. 96.

(*p*) *Browne v. Carr*, 2 Russ.
600; *S. C.* 7 Bing. 508.

(7) It is hardly necessary to observe, that the general effect of a release of the drawer of a bill of exchange, where the acceptance is upon the credit of effects in the hands of the acceptor, and consequently where the drawer is not primarily liable, will not (where the release is silent as to the securities in the hands of the creditor, and the creditor is in possession of a bill of exchange so accepted) release the acceptor; for it would be *pro tanto*, releasing the acceptor, and no benefit to the drawer (see the observation of Lord Eldon, C., in *Mawson v. Stock*, 6 Ves. 300; and see *Thomas v. Courtney*, 1 B. & Ald. 1). But if the instrument of composition contains a clause, by which the creditor relinquishes his right to the securities in his hands, then the creditor's right to proceed upon the bill of exchange is to be considered as given up in favour of the drawer, or person compounded with (*Stock v. Mawson*, 2 Bos. & P. 286).

pal, may stand in the place of the creditor where he has proved, or may go in under the commission and prove the debt himself where the creditor shall not have proved, and if the surety voluntarily lie by (*q*), or absent himself (*r*), or do not choose to take the course which would enable him to assert his rights, he must be considered (notwithstanding the notice) to have assented to the act.

The act of one partner is binding on his co-partners, in all cases where the act done is incident to the relation of partners (*s*); and though, as a general rule, one partner cannot bind the rest by deed; unless expressly authorized by the articles of partnership (*t*), yet it would seem, compounding with and releasing the principal, is an act which one partner may do on behalf of the others (*u*), and that a release executed by one partner concludes the firm, and will discharge the surety at law and in equity (*v*).

(*q*) *Browne v. Carr*, 2 Russ. 600; *S. C.* 7 Bing. 508.

(*r*) *Langdale v. Parry*, 2 Dowl. & Ry. 337.

(*s*) *Per* Lord Eldon, C., in *ex parte Hall*, 1 Rose, 2; and see *ex parte Hodgkinson*, 19 Ves. 391;

and see *ante*, p. 79.

(*t*) *Harrison v. Jackson*, 7 T. R. 207.

(*u*) See *Hawkshaw v. Parkins*, 2 Swanst. 539.

(*v*) See *Hawkshaw v. Parkins*, *supra* (8).

(8) In this case, a demurrer had been put in to a bill in equity filed by a surety, which bill stated that two partners having agreed to execute a release to the principal, in consideration of an assignment of his effects, one alone executed the release, and the bill prayed that the instrument by which the surety was bound (which was a bond), might be delivered up to be cancelled.

In support of the demurrer, it was contended, that a release of partnership debts executed by one partner, was good against all, and that the surety had a defence at law. In support of the bill, it was contended, that a release executed by one partner is not binding on his co-partners, unless the articles of partnership expressly authorized the partner executing to bind his co-partners by deed, and *Harrison v. Jackson*, was referred to. Lord Eldon observed, that the effect of making a *grant* by one partner on behalf of all (which was the case in *Harrison v. Jackson*), was very different from the effect of a composition and release, and seems to have been of opinion, that the latter act was such, as one partner might do on behalf of the others. The bill, however, prayed relief which could not be obtained at law, namely, the delivery of the bond to be cancelled, and the demurrer was overruled.

3. Where the creditor gives time to, or releases, a co-surety.

As the discharge of the surety, has not the effect of a discharge of the principal (*w*), so neither will the discharge of one co-surety, have the effect of discharging another co-surety. The creditor may release, or compound with, or give time to, one co-surety, without prejudicing his right to proceed against the others: but he cannot recover from the other co-sureties more than the proportion they would have paid, supposing the co-surety released had contributed his share (*x*).

To this rule, however, there seems to be, *at law*, this exception, in relation to proceedings instituted by the creditor against a surety, for the recovery of the debt, which he and others are jointly and severally liable to pay; namely, that whatever operates to discharge one of two or more joint, or joint and several, debtors, is a discharge of all: thus, it was lately decided, in the case of *Nicholson v. Revill* (*y*), that a creditor who had taken the joint and several promissory note of his principal, and of two other persons as his sureties, as a security for the debt owing to the creditor, and had before the note became due, in consequence of some payment made to him by one of the sureties in satisfaction of the creditor's claim against such surety upon the note, discharged such surety, and erased his name from the note, the creditor had thereby lost his remedy against the co-surety (9).

(*w*) See *ante*, p. 176.

(*x*) *Ex parte Gifford*, 6 Ves. 805; *Stirling v. Forrester*, 3 Bli. 575; and see *Dunn v. Slee*, 1 J. B.

Moo. 2; S. C. Holt, N. P. C. 399.

(*y*) 4 Ad. & Ell. 675.

(9) In the judgment delivered by Lord Denman, C. J., in the case of *Nicholson v. Revill*, (*supra*), some doubt is thrown out by him upon the soundness of Lord Eldon's decision in the case of *ex parte Gifford* (6 Ves. 805); which decision, the learned Chief Justice thinks, militates against the rule of law above adverted to.

When a co-surety has, by the conduct of the creditor, been released from his liability (and the same

The circumstances in *ex parte Gifford* were as follow:—Marshall and Haigh, creditors of Bedford, upon a promissory note, requiring further security, Bedford, Niblock and Burgess, and Baylis, joined in a promissory note as a collateral security. Niblock and Burgess, and Bedford, became bankrupts. Marshall and Haigh proved the whole debt under each commission, and afterwards brought an action against Baylis, who entered into a composition with his creditors, under which, Marshall and Haigh received a dividend of four shillings in the pound. The dividend paid by the estate of Bedford was four shillings in the pound, and that by the estate of Niblock and Burgess, five shillings. A petition was then presented, praying that the proof against the estate of Niblock and Burgess might be expunged, which was dismissed.

Now it is established by a variety of cases and authorities, that if two are bound jointly (*Com. Dig. Pleader*, 2 W. 30), or jointly and severally (*Com. Dig. Pleader*, 2 W. 30; *Hammon v. Roll*, March, 202; *Co. Litt.* 232 a, n. (1); the judgment in *Clayton v. Kynaston*, 2 Salk. 573; the observation of Bailey, J., in *Collins v. Prosser*, 1 B. & Cress. 682; *S. C.* 3 Dowl. & Ry. 112; and see *Cocks v. Nash*, 9 Bing. 341; *Garrett v. Jull*, Selw. N. P. 377, 7th ed.), for the payment of an entire sum of money, a release to one may be pleaded *at law* in bar by both, and Lord Hardwicke lays it down, that such a release operates as a discharge in equity, as well as at law (*Bower v. Swadlin*, 1 Atk. 294); unless, therefore, this general rule is relaxed in cases arising out of the relation of principal and surety, the case of *ex parte Gifford* must have been determined by Lord Eldon upon this circumstance (from which only it is distinguishable from the case of *Nicholson v. Revill*), namely, that the composition entered into with Baylis was subsequent to the proof made by Marshall and Haigh under the commission of Niblock and Burgess. This distinction was taken by Lord Harcourt, in *ex parte Smith* (1 P. Wms. 237), in a case where the obligee in a bond, had released one of two principal debtors: the case of *ex parte Smith* does not, however, appear to have been referred to in *ex parte Gifford*.

In delivering the judgment of the Court, in the case of *Nicholson v. Revill*, Lord Denman (though he admitted that the authority of Lord Eldon, as expressed in *ex parte Gifford*, clashed with the judgment in *Nicholson v. Revill*) expressly stated, that the Court, in pronouncing judgment in favour of the defendant the co-surety, did not proceed on any doctrine as to the relation of principal and surety, but gave its judgment on the principle laid down by L. C. J. Eyre, in *Cheetham v. Ward* (1 Bos. & P. 630), that where a personal action is once suspended, by the voluntary act of the party entitled to it, it is for ever gone and discharged.

Upon this last principle the Court of Common Pleas determined, that where the obligee in a joint and several bond, made one of two obligors with others his executors, the action on the bond as to both obligors was discharged: there being but one duty extending to both obligors, and a discharge of one, or satisfaction made by one, or the suspension of the right of action as to one, released and discharged the action as to both. Now, in equity, a debt due from an executor

acts are held to discharge the remaining sureties, *quoad* the share which such co-surety would otherwise have been held to contribute, as would, if done to the principal, have discharged the surety), (2) the remaining co-surety, or co-sureties, will, when it is ascertained what each of the co-sureties would, if no such release had been made, have contributed towards the debt of his principal, (for the co-sureties may be responsible in different amounts), (a) be held exonerated as to so much of the original debt as the co-surety discharged would (if he had not been discharged) have been compelled to pay; thus, if there are four sureties, each of them being answerable as amongst themselves for the debt of his principal in equal proportions, and the creditor, without the consent of one of the co-sureties, gives time to, or compounds with, the remaining three, the co-surety undischarged, being originally liable to make good only one-fourth part of the debt of his principal, will, upon payment of a sum equivalent to that proportion of the debt, be relieved from his responsibility as surety, and will be entitled to have credit given to him for all sums of money received, or receivable, in respect of the debt for which the co-surety became answerable, until the whole sum paid by the co-surety, has been repaid him (b).

(2) See *ante*, p. 167, *et seq.*

6 Ves. 805; *Mayhew v. Crickett*,

(a) See *ante*, p. 149.

2 Swanst. 185; *S. C.* 1 Wils. C.C.,

(b) *Stirling v. Forrester*, 3 Bli.

418.

575; and see *ex parte Gifford*,

to his testator, is assets in the hands of the executor for payment of the testator's debts, and as it would seem, for payment also of his legacies; for though the action at law is gone, the duty remains; and Lord Eldon, in the case decided by him in *Bankruptcy*, may possibly have considered, that cases arising out of the relation of principal and surety are not within the rule of law as laid down in the case of *Nicholson v. Revill*; and that until Niblock and Burgess had paid eight shillings in the pound upon the debt, for the payment of which they, together with Baylis, had become sureties, they had no equitable claim to be relieved from their liability. Such seems to have been the view taken by Baron Parke of Lord Eldon's decision, from the observation made by the former learned judge, in *Smith v. Winter*, 4 Mees. & W. p. 465.

Upon the above principle, if a sheriff take a replevin bond from one surety only, and is sued by the person making cognizance, for having taken insufficient pledges, and the party distraining recover damages and costs in such action, the sheriff will not be entitled to recover against the surety on the bond, more than a moiety of the sum composed of the rent which the party distraining established in the replevin suit to be due, and the costs of that replevin suit; for if the sheriff had, as he ought to have done according to the *statute of 11 Geo. 2, c. 19*, taken a bond with two sureties, the surety who executed the bond would have been entitled to contribution from his co-surety, and consequently would have paid but a moiety of the debt; and as the single surety is, by the sheriff's conduct, deprived of his right of calling upon his co-surety, the surety executing ought only to pay one-half (c).

If A. and B. are sureties for C., and D. give A. an indemnity, and A. pays the whole debt for which he together with B. became surety, and afterwards, without the concurrence of D., releases B. from his liability, A. will not be allowed to recover from D. under the indemnity, more than a moiety of the money paid by him; for as between A. and D., A. is the principal, and D. the surety, and as A. would, if no release had been given by him, have been entitled to call upon B. for contribution, so D. upon payment of the whole debt, had the same right which by the release given by A. to B. is gone (d). But if the creditor, when he accepts such composition, expressly reserve his remedies against the other co-sureties, he is not precluded from proceeding against them for the remainder of his debt, leaving the co-sureties to their remedy for

(c) See *Austin v. Howard*, 7 Taunt. 327; *S. C. 1 J. B. Moo. 68*; *S. C. 2 Marsh. 352*. (d) *Hodgson v. Hodgson*, 2 Keen, 704.

contribution against the co-surety compounded with (e).

4. Where the creditor delays suing the principal, and neglects to give notice to the surety, that the principal has made default.

The passive conduct of the creditor in not suing the principal for the debt, which the surety together with the principal has engaged to pay, will not of itself, operate as a discharge to the surety (f),

(e) See Lord Eldon's judgment in *ex parte Gifford*, 6 Ves. 805 (1).

(f) *Eyre v. Everett*, 2 Russ. 381; *Brickwood v. Annis*, 5 Taunt. 614; S. C. 1 Marsh. 250; *Orme v. Young*, Holt, N. P. C. 84; *Perfect v. Musgrave*, 6 Price, 111; *The Trent Navigation Company v. Harley*, 10 East, 34; *Peel v. Tatlock*, 1 Bos. & P. 419; *Lysaght v. Walker*, 5 Bli. N. S. 1; *The London Assurance Company v.*

Buckle, 4 J. B. Moo. 153; *Shepherd v. Beecher*, 2 P. Wms. 288; and see *Langdale v. Parry*, 2 Dowl. & Ry. 337; and the observations of Lord Eldon in *Wright v. Simpson*, 6 Ves. 734; and *English v. Darley*, 2 Bos. & P. 61; of Lord Alvanley, C. J., in *Clark v. Devlin*, 3 Bos. & P. 363; and of Tindal, C. J., in *Goring v. Edmonds*, 6 Bing. 94.

(1) Lord Eldon, in his judgment in *ex parte Gifford*, observes, that in some cases it may be a beneficial contract for the co-surety to make in compromising with the creditor, to consent to the reservation of the creditor's rights to go against the other co-sureties, where the creditor insists upon such a stipulation, and thus leave the co-surety who compounds, to his chance as to his ultimate liability between him and his co-sureties; for though any one of the co-sureties who has not compounded, may pay more than the co-surety who has compounded, *non constat* he may pay more than the proportion of the debt of his principal to which he was originally liable, and until he does so, he cannot bring an assumpsit against the co-surety who has compounded. But it seems to be doubtful, whether a reservation of this kind would be operative *at law*, where the party released is one of two or more joint, or joint and several, obligors. In delivering the judgment of the court, in the case of *Nicholson v. Revill* (above adverted to), Lord Denman, C. J., says, "For some of the expressions employed" (by Lord Eldon in his judgment in *ex parte Gifford*) "would seem to lay it down, that a joint debtor might release one of his debtors, and yet by using some language of reservation in the agreement between himself and such debtor, keep his remedy entire against the others, even without consulting them. If Lord Eldon used any language which could be so interpreted, we must conclude that he either did not guard himself so cautiously as he intended, or that he did not lend that degree of attention to the legal doctrine connected with the case before him, which he was accustomed to afford." In support of Lord Denman's opinion as to the inutility of such a reservation *at law*, the case of *Everard v. Herne* (Lit. 190) may be referred to, where it is laid

though the creditor suffer three (*g*), or even five years (*h*), to elapse, without taking any means to obtain payment of his debt: and though the principal should in the meantime become bankrupt (*i*), or insolvent (*j*); since it is the duty of the surety to go and inquire as to the state of the transaction, and to see whether the principal has paid the debt, which the surety engaged he should pay.

Neither is a surety in a bond released from his liability, who guarantees the faithful discharge of duty by another person, for a limited period (*k*), or during such time as he should be employed in the service of the party secured (*l*), and the party secured fails in properly examining the accounts of the person in his employment, for a period of eight or nine years, and then not calling upon the surety for payment of the sums in arrear, and not accounted for (*m*):—or, after he discovers that the person in his employment has been guilty of embezzling his money, neglects to give notice of such embezzlement to the surety (*n*):—or, having given notice to the surety of the defalcation of the principal, and having been repaid by the surety the sums so embezzled by the principal, and been desired by the surety not to place further confidence and trust in the principal, nevertheless gives further credit to the party originally guilty (*o*): provided there has been no industrious concealment of the transaction by the party secured, which, on general principles of law, will amount to fraud (*p*).

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| (<i>g</i>) <i>Peel v. Tatlock, supra.</i> | (<i>m</i>) <i>The Trent Navigation Company v. Harley, supra.</i> |
| (<i>h</i>) <i>Eyre v. Everett, supra.</i> | (<i>n</i>) <i>Peel v. Tatlock, supra.</i> |
| (<i>i</i>) <i>The London Assurance Company v. Buckle, supra.</i> | (<i>o</i>) <i>Peel v. Tatlock, supra;</i> |
| (<i>j</i>) <i>Eyre v. Everett, supra.</i> | <i>Shepherd v. Beecher, supra.</i> |
| (<i>k</i>) <i>Shepherd v. Beecher, 2 P. Wms. 288.</i> | (<i>p</i>) <i>Peel v. Tatlock, supra;</i> and see the observations of Tindal, C. J., in <i>Goring v. Edmonds, 6 Bing. 94.</i> |
| (<i>l</i>) <i>The Trent Navigation Company v. Harley, supra.</i> | |

down and agreed to by the whole court, that if an obligee release one of two obligors, with a proviso that the other shall have no benefit from the release, such a proviso is void. (See the last note.)

Where a bond was executed by an insurance broker as the principal obligor and two sureties, with a condition that if they should pay the obligees certain premiums which should become due for assurances on ships at sea, to be made with the obligees by the insurance broker within six months after the making of the insurances, the bond was to be void, and the broker became bankrupt, and was indebted to the obligees in a considerable sum for premiums: although the premiums had been due three years before the bankruptcy, and no intimation whatever had been given by the obligees to the sureties of the state of the account as between the former and the principal, until after the bankruptcy, it was held, that the sureties were not discharged by the laches of the obligees, in suffering the credit of the broker to remain so long beyond the six months mentioned in the bond (g).

Upon the above principle, if the holder of a bill of exchange, having complied with the law merchant, by protesting it for non-payment, and giving notice to the drawer and indorsers, forbear to sue the acceptor (r):—or if, after having signed judgment against the acceptor, he fail to prosecute that judgment (s), the drawer and indorsers are not discharged.

(g) *The London Assurance Company v. Buckle*, 4 J. B. Moo. 153.

(r) *Walwyn v. St. Quintin*, 1 Bos. & P. 652; and see *Farquhar*

v. Southey, Mood. & M. 14 (2).

(s) See the observation of Lord Alvanley, O. J., in *Clark v. Devlin*, 3 Bos. & P. 363.

(2) In this case, the defendants had accepted two bills of exchange for 500*l.* each, for the accommodation of one Leader, the drawer. Leader paid them into the hands of the plaintiffs, his bankers, *without notice*, who retained possession of them for several years, charging Leader with interest, but never debiting him with the amount of the bill. During this time the plaintiffs became bankers to the defendants also, but never gave them notice that they held the bills against them. The balance of the defendants' account was always in their favour, and sometimes exceeded the amount of the bills. In an action by the bankers against the acceptors for the amount of the bills, three years after the bankruptcy of the drawer, it was held, that the plaintiffs had not been guilty of laches, in not having, when they had money in their hands to an amount exceeding that of the bills, applied that money in extinction of the bills.

ed; because such delay does not prevent them from doing what, on receiving notice of non-payment by the acceptor, they ought to do, namely, pay the bill themselves. But if the holder take out execution against the acceptor, and waive that execution, he discharges those who were sureties for the due payment of the bill (*t*).

If, however, the instrument of suretyship contain a stipulation, that the creditor, upon the default of the principal, *shall sue without delay*, it would seem, that mere passiveness on the part of the creditor, would have the effect of destroying the benefit of such security, as against the surety (*u*): thus, if commissioners are empowered, under an Act of Parliament, to advance money on certain securities, and in the Act of Parliament there is a clause requiring the commissioner, as soon as the money shall become payable under the instrument received by them from the principal and his surety in pursuance of the Act, *to sue without delay*, a non-compliance by the commissioners with the clause contained in the Act, will discharge the surety (*v*). So in a case where S. gave C. his guarantee for the value of coals to be supplied to P., on condition that no application should be made to him for payment, *but on failure of the utmost efforts and legal proceedings to obtain the same from P.*, and C. allowed two years to elapse after P.'s debt became payable, before he commenced proceedings against P. for the recovery of his debt (during which time he might have proceeded against P.); P. having afterwards taken the benefit of the Insolvent Debtors Act, it was held in an action brought by C. against

(*t*) See *ante*, p. 177.

(*u*) See the observation of Lord Eldon in *The Bank of Ireland v. Beresford*, 6 Dow, 233.

(*v*) See *The Bank of Ireland v.*

Beresford, *supra*; and the case of *Payne v. Ives*, stated *ante*, p. 29, as one of the laches by the creditor in not calling upon the surety to confirm an executory contract.

S. upon his guarantee, six years and three months after the principal's liability attached, that a plea of the Statute of Limitations was a good plea to the recovery by C. of P.'s debt; for that the condition was inserted for the surety's protection, and that the creditor ought to have used his utmost endeavours to recover the debt as soon as it was possible; for, were it otherwise, the creditor would have the power by his own laches, to keep alive the surety's liability for ever (w). So where a person put his son apprentice to a merchant, and gave him a bond for his son's fidelity, and at the same time took a covenant from the merchant, that he would *at least once a month*, see his apprentice make up his cash: the father was held answerable for no more than the merchant could prove the apprentice embezzled in the first month when the embezzlement began, and this notwithstanding the merchant had taken the accounts monthly, but had been deceived by the false entries of his apprentice; the meaning of the agreement being, the master should see the accounts *effectually* made up once a month, and that the surety would be liable but for one month's embezzlement (x).

5. Where the creditor receives further security from the principal.

The liability of the surety is not discharged by the circumstance of the principal's giving additional security to the creditor, if such additional security does not operate as a satisfaction of the former security, and so have the effect of tying up the hands of the creditor, and disabling him from suing the principal in respect of that original security (y):

(w) *Holl v. Hadley*, 2 Ad. & Ell. 758.

(x) *Montague v. Tidcombe*, 2 Vern. 508.

(y) *Eyre v. Everett*, 2 Russ. 381; *Twopenny v. Young*, 3 B. & Cress. 208; *Melville v. Glendinning*,

7 Taunt. 126; and see *Clarke v. Henty*, 3 You. & Coll. 187; and the observation of Lord Eldon, C., in *The Bank of Ireland v. Beresford*, 6 Dow. 233; and *Hodgson v. Nugent*, 5 T. R. 277.

thus, if the debt of the principal is secured by a bill of exchange, accepted by the principal, to which the surety is a party, and the bill at its maturity is not honoured by the principal, and the principal forward to the creditor another bill of exchange, if the creditor enter into no agreement precluding him from proceeding upon the original security, the acceptance of such second security will not, of itself, prevent him from suing upon the former security (z). So, if one bind himself by bond, as surety for the fidelity of his principal, during such time as the latter shall continue in the service of the obligee, and the surety obligor dies, and the obligee require from the principal further security, who procures a bond from another person as surety, *in the same penal sum, and with the same condition*; an intention on the part of the obligee to give up the security of the deceased obligor, and to release the estate of the surety in the first bond, will not be inferred (in the absence of any express stipulation), simply by taking such second bond; for as the representatives of the first obligor would only be answerable to the extent of the surety's assets, it may reasonably be considered that the obligee took such second bond as an additional or further security (a). So, if the creditor take from the principal a *cognovit* without notice to the bail, the bail are not thereby discharged, if time has not been given to the principal (b). But where a father had given his bond as surety for his son, and the obligee, upon the surety's decease, instituted a suit in equity to administer his estate, but was afterwards prevailed upon by the son, and the widow of the deceased surety (the one being the surety's personal representative, and the other the surety's heir at law), to take their bond for the debt,

(z) *Melvill v. Glendining*, 7 581; S. C. 2 Sim. 253.
Taunt. 126.

(b) *Hodgson v. Nugent*, 5 T. R.

(a) *Gordon v. Calvert*, 4 Russ. 277.

and to stay the proceedings, Lord Abinger, C. B., considered (notwithstanding the original bond remained in the possession of the obligee), that the latter bond operated as a satisfaction of the first, and consequently that the former could not be enforced (c).

In general, where a simple contract security is given for a debt, it is extinguished by a specialty security, if the remedy given by the latter is *co-extensive* with that, which the creditor had upon the former; for the specialty security gives a remedy of a higher nature than the party had upon the simple contract security, and the simple contract security becomes merged in the higher security (d) (3). But if the original security be a specialty, and the second a mere simple contract security, the latter cannot operate as an extinguishment of the former, unless it produce the fruit of a judgment (e). And even where the second security would otherwise have operated at law as an extinguishment of any remedy the party might have on the original security, yet, if the creditor's remedy against the principal has not been diminished, but accelerated (f):—or, the second security is taken with the consent of the surety (g):—or, it can be collected, that it was the intention of the parties that the former security should continue an existing security, and the latter

(c) *Clarke v. Henty*, 3 You. & Coll. 187.

(d) See the judgment in *Two-penny v. Young*, 3 B. & Cress. 208; and the judgments of Lord Ellenborough, C. J., in *Drake v. Mitchell*, 3 East, 251; and of Sir John Strange, M. R., in *Jacomb v.*

Harwood, 2 Ves. 267.

(e) *Drake v. Mitchell*, 3 East, 251.

(f) *Hulme v. Coles*, 2 Sim. 12.

(g) *Tyson v. Cox*, T. & Russ. 395; *Clarke v. Devlin*, 3 Bos. & P. 363.

(3) A debt, however, of the principal, which is a simple contract debt, is not extinguished by operation of law, in a case where a surety gives the creditor a bond or other instrument under seal to secure that debt, unless the principal is a party to the latter security. (See *White v. Cuyler*, 6 T. R. 176; *S. C.* 1 Esp. 200; and the observations of Lord Abinger, C. B., in *Clarke v. Henty*, *supra*.)

should be a further, or collateral security (*h*), the surety is not discharged; for the principle upon which the surety is entitled to be discharged, is, that the remedies of the surety have been, or by possibility might have been, prejudiced by the conduct of the creditor, without the surety's consent.

Where the creditor receives from the principal, without the knowledge of the surety, another security which is not strong enough to operate by law, in destruction of the former security, (as where it does not give a remedy of a nature as high as, or higher, than the original security, or where it appears from the second instrument, that it is intended as a further, or additional security only, and consequently that the former security should remain an existing security,) a dealing by the creditor with the principal in respect of the second security, will not *at law*, have the effect of discharging the surety on the original security, although the surety might have been discharged, had the creditor dealt with the principal in the same manner with respect to the original security (*i*).

6. Of neglect by the creditor in regard to the securities.

It has been already stated, that a surety is entitled to the benefit of all securities in the hands of the creditor (*j*), whether he knows of the existence of those securities, or not (*k*), and if any of those securities should be lost (*l*), or be allowed to get into the possession of the principal (*m*), the surety will to that extent be discharged; and it is imma-

(*h*) See the observation of Lord Eldon, C., in *The Bank of Ireland v. Beresford*, 6 Dow, 233; and see *Twopenny v. Young*, 3 B. & Cress. 208; and *Gordon v. Calvert*, 4 Russ. 581; S. C. 2 Sim. 253.

(*i*) See *Twopenny v. Young*, 3 B. & Cress. 208.

(*j*) See *ante*, p. 113.

(*k*) See *ante*, p. 114.

(*l*) *Ex parte Mure*, 2 Cox, 63; *Williams v. Price*, 1 Sim. & S. 581.

(*m*) *Capel v. Butler*, 2 Sim. & S. 457; *Law v. The East India Company*, 4 Ves. 824.

terial whether it happens in consequence of the creditor's wilful neglect, or want of due diligence (*n*), or from an erroneous impression as to a fact (*o*), or through the mistaken advice given to him by his counsel (*p*); but in all these cases the creditor must have (*q*), or might have had (*r*), full power and dominion over the security.

Where P. agreed with C. for the sale to C. of an annuity, subject to redemption by P. at a certain sum upon giving notice, and for securing which annuity, P. and S. as his surety, bound themselves in a joint and several bond, and as a further security, P. assigned to a trustee for the grantee certain vessels belonging to P., and the grantee not having registered the vessels according to the form, and in the mode required by the several Acts of Parliament for the registry of ships or vessels, acting under the opinion of counsel, that the assignment was valid without the registry, in consequence of which, P. was enabled to dispose of the vessels to other persons: it was held, upon bill filed by S. to redeem the annuity at the stipulated price of redemption, that he was entitled to deduct the value of the vessels sold (*s*). So where P., who had been appointed one of the officers of the East India Company, and S., as his surety, became bound that P. should duly account for all monies received, laid out, or expended by him on account of the Company, and P. dying, the officers of the Company in India, under an erroneous settlement with P.'s representative there, permitted P.'s representative in India to remit through the treasury of the Company, the effects of

(*n*) *Ex parte Mure*, *supra*; *Williams v. Price*, *supra*; *Philips v. Astling*, 2 Taunt. 206.

(*o*) *Law v. The East India Company*, 4 Ves. 824.

(*p*) *Capel v. Butler*, *supra*.

(*q*) *Ex parte Mure*, 2 Cox, 63;

Williams v. Price, 1 Sim. & S. 581.

(*r*) See *Capel v. Butler*, 2 Sim. & S. 457; *Halford v. Byron*, Pre. Ch. 178; S. C. 2 Eq. Ca. Ab. 188.

(*s*) *Capel v. Butler*, 2 Sim. & S. 457.

P. in India, to P.'s representative in England: the permitting of the effects of P. to be withdrawn from India (*which could not have been done without the concurrence of the Company*), was held a discharge to the surety to that extent (*t*). So where S. had become responsible to the grantor of a mansion-house and land, for the payment by the grantee and his heirs of the rent reserved, and of the performance of a covenant to keep the premises in repair, and the grantee having suffered the rent to run in arrear, and the premises to fall into a ruinous state, the grantor in consideration of ten shillings, took a reconveyance of the estate to him and his heirs from the grantee: it was held, that the surety was discharged from his liability by the act of the grantor, who, by accepting a reconveyance of the estate, had deprived the surety of his remedy against the subsidiary fund, to which, upon payment of what was due to the grantor, the surety had a right to resort for his indemnity (*u*). So where J. S. gave a warrant of attorney and his bond to D., conditioned for the payment of the whole interest annually of the money due from J. S. to D., and of £500 annually in discharge of the principal, until the whole was paid, and D. assigns to C., his creditor, the bond and warrant of attorney, and all powers for recovering the money thereby secured, for securing the payment of money owing by D. to his creditor, and makes his creditor his attorney; and the creditor fails to enter up, and enforce a judgment, by virtue of such warrant of attorney, in consequence of which, upon the obligor's decease, other creditors of the deceased obligor obtain a priority, but which, if the creditor had used due diligence, he might have (by making his debt of a higher nature) secured in his own favour, both upon the real and

(*t*) *Law v. The East India Company*, 4 Ves. 824.

(*u*) *Lord Harborton v. Bennett*, 1 Beat. 386.

personal estate of the obligor : C. is chargeable for wilful default, in forbearing the obligor to the amount of the loss incurred by such forbearance (v). So where D. deposits with the creditor, a bill of exchange, and the creditor fails to present it for payment when due, and the acceptor afterwards becomes bankrupt (w) :—or, where having tendered it for acceptance, it is refused to be accepted :—or, having been accepted, it is, when presented for payment, dishonoured, and the creditor fails to give due notice of its non-acceptance, or dishonour (x), to the several parties to the bill, whereby any one of them becomes discharged ; the creditor is chargeable to the amount of the loss incurred by such forbearance, or neglect. But where a bill of exchange is in the hands of the creditor, which it is obvious will not be paid by the acceptor, the same strictness of proof of the presentation of the bill is not necessary to charge the surety, as would have been necessary to support an action upon the bill itself, as the surety insures, as it were, the solvency of the principal ; therefore, if the principal accept a bill of exchange drawn by the creditor, for the price of goods sold to the principal (the payment of which goods is also guaranteed by the surety), and the principal becomes bankrupt (y), or notoriously insolvent (z), before the bill becomes due, it is the same thing as if he were dead, and it is nugatory to go through the ceremony of making a demand upon him : however, it would seem that in such a case, it is competent for the surety to show (if he can do so), that notwithstanding the insolvency of the prin-

(v) *Ex parte Mure*, 2 Cox, 63.

(w) *Philips v. Astling*, 2 Taunt. 206.

(x) *Bleard v. Hirst*, 5 Burr. 2670 ; *Goodall v. Dolley*, 1 T. R. 712 ; *Philips v. Astling*, 2 Taunt. 206.

(y) *Warrington v. Furber*, 8 East, 242 ; S. C. 6 Esp. 89 ; and see *Bickerdike v. Bolman*, 1 T. R. 405.

(z) *Holbrow v. Wilkins*, 1 B. & Cress. 10.

cipal, the bill would have been paid, if a demand for payment had been made upon him (a).

If the security in the hands of the creditor is a bill of exchange, or promissory note, to which the surety is not a party, and such bill, or note, is not paid at its maturity, it is no objection by the surety, against the creditor's recovering upon his guarantee (if the creditor has so acted, that his rights to proceed against the parties to the bill, or note, or the rights of the party giving the instrument of suretyship have not been affected), that the surety had not notice of its non-payment (b); for notice is only required by the custom of merchants to be given to him, who is a party to the bill, or note, and as the surety has not made himself subject to the obligations of the law merchant, and therefore not liable to be sued upon such bill, or note, so neither ought he to be entitled to the advantages. And even where the surety is a party to a bill of exchange in the hands of a creditor, he may by his undertaking waive the formalities which the law imposes upon the holders of bills of exchange; namely, a due presentment to the acceptor, and a notice of dishonour to the drawer, and indorsers; thus, where D. and I. had delivered, and indorsed, to the creditor, a bill of exchange drawn by D., and accepted by A., and D. and I. join in executing a bond to the creditor, the condition of which was (after reciting the above circumstances), that if the bill for the payment of which by the acceptor, D and I. had become sureties, be not paid by the acceptor when due, D. and I. would pay the bill within one month after it became due, and was not paid by the accep-

(a) See *Lafitte v. Slatter*, 6 Bing. 623; *Warrington v. Furber*, 8 East, 242; S. C. 6 Esp. 89; *Holbrow v. Wilkins*, *supra*; and the observation of Lord Ellenborough in *Claridge v. Dalton*, 4 M. & Sel. 226.

(b) *Swinyard v. Bowes*, 5 M. & Sel. 62; *Van Wort v. Woolley*, 3 B. & Cress. 439; S. C. 5 Dowl. & Ry. 374; and see the observation of Grose, J., in *Warrington v. Furber*, 8 East, 242.

tor : the intention of the parties to the bond was held to be, not to give the creditor a security of a higher nature in case the ordinary formalities had been complied with, but to exonerate the creditor from the risk of neglecting to present the bill to the acceptor, and giving notice to the parties to the bill of its dishonour (c) : which laches on the part of the creditor would have discharged the sureties, if no bond had been executed.

7. Where the creditor does not properly perform on his part, or where he varies, the original agreement (d).

Any variation in the agreement, to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him (e), or which may amount to a substitution of a new agreement for the former agreement (f), and though the original agreement may, notwithstanding such variation, be *substantially* performed (g), will discharge the surety ; thus, where a bill of exchange was drawn by C. in England, on P. in India, payable sixty days after sight, and a bond was entered into by S. conditioned to be void if the bill should be paid in India, or paid in England by the obligor, within thirty days after the bill should be produced to him after being sent back here *duly protested for want of payment*, and the bill was transmitted to India, and when it arrived there the drawee had left the place, and his agent refused to accept it, and the bill was then

(c) *Murray v. King*, 5 B. & Ald. 165 ; and see Lord Thurlow's observation in *ex parte Mure*, 2 Cox, 63.

(d) The observations that have been made under the head, "Where the Creditor gives time for payment to the Principal," (see *ante*, p. 167), might have been, it is conceived, introduced with propriety into this section ; for giving time is one mode of varying

the original agreement: the separation has been made with a view to a more easy reference.

(e) *Evans v. Whyle*, 5 Bing. 485 ; *S. C.* Mood. & M. 468 ; *Eyre v. Bartrop*, 3 Madd. 221 ; *Archer v. Hale*, 4 Bing. 464.

(f) *Whitcher v. Hall*, 5 B. & Cress. 269 ; *S. C.* 8 Dowl. & Ry. 22.

(g) *Whitcher v. Hall*, *supra*.

protested in India for *non-acceptance*, and sent back to England so protested: it was held by the Court of King's Bench (overruling the same case in the Court of Common Pleas), that notwithstanding all the care that could be taken had been taken, to enforce the payment of the bill by C. from P. in England, after it had been so returned, and had been presented to him, and protested for non-payment *here*, and notwithstanding there was no reasonable expectation of any person being in India during the sixty days after it had been so protested for non-acceptance, that would have paid the bill at the end of that time, yet, inasmuch as the conditions upon which S. when applied to, to come and add his security to that of the bill, and for which when he entered into that security he expressly stipulated, had not been complied with, the obligor was not liable (*h*). So in a case where C. contracted to let, and P. to take, the milking of thirty cows at the sum of 7*l.* 10*s.* per cow per annum, the benefit of which was to enure to P., but S., as P.'s surety, stipulated that he would pay the rent, and it was afterwards agreed between C. and P. (the latter having then thirty-two cows), that C. instead of taking away two cows at that time, should be at liberty to take four at the fall of the year, and accordingly C. did, at the fall of the year, take away four cows, leaving P. after that period less than thirty: it was held by Bayley and Holroyd, Justices (Littledale, J., dissenting), that the contract was an entire contract for the letting of thirty cows, neither more nor less,—that the expression of 7*l.* 10*s.* per cow, did not make the contract a divisible contract, for that had reference only to the measure of the rent, not to the nature of the contract,—that C., in an action against S., was bound to prove a *literal* performance

(*h*) *Campbell v. French*, 6 T. R. 200, overruling *French v. Campbell*, 2 H. Blk. 163.

of the contract,—that he had not done so, inasmuch as he had shown that during part of the year he had allowed P. to have twenty-eight cows only, and although it was proved by P., that this new agreement as to the number of cows which he was to have from time to time, made no difference as to profit or loss, and that during the whole period of his occupation, he had had *upon an average*, the milking of thirty cows, yet, as S. had not been consulted upon the subject, and had had no opportunity of exercising his own choice and judgment in the matter, the substitution of the new agreement put an end to the original one, and relieved S. from his engagement (i).

Where an agreement was entered into between C. and P., whereby it was agreed that P. should perform certain works for C. for the sum of 10,000*l.*, and should receive from time to time, three-fourths of the cost of the part completed, the first payment to be made after one-eighth was performed, and the remaining fourth part to be paid one month after the whole was completed, and that if P. should fail to perform the work, C. might employ others to perform it, and deduct the expense from the sum payable to P.: and P. having performed a part of the work at an expense which was estimated at 5000*l.*, and having received from C. at various times whilst he was engaged upon the works, sums of money amounting to 8000*l.*, abandoned the undertaking, and C. thereupon caused the works to be completed at an expense of 4000*l.*: a court of equity, upon the application of a surety (who had entered into a bond conditioned for the performance of the works by P.), granted a perpetual injunction against any proceeding by C. on the bond, notwithstanding C. had, in a court of law, in an action brought by him against the surety upon the bond,

(i) *Whitcher v. Hall, supra.*

(suggesting the loss sustained by C. from the breach of the contract by P.,) obtained a verdict for nominal damages ; for the money payable under the contract to P. by way of instalment, added to the sum afterwards paid for the completion of the work, was less than the sum, which if P. had performed all the contract, C. would have to pay him, and the loss had arisen, not from the non-performance of P.'s contract, but from C.'s having advanced more than the contract required (*j*).

Where the condition of a bond, after reciting that C., the obligee, was a banker, and that P., a paper manufacturer, kept an account with C. which had been overdrawn to the amount of 4000*l.*, and that in order to enable P. the better to carry on his business, he had applied to C. to allow him for a time to overdraw such further sums as he should require, so as that the same, together with the 4000*l.*, should not exceed in the whole at any one time 5000*l.*, which C. had agreed to do, was, for the payment by P., and S. as his surety, or one of them, of the sum of 4000*l.*, and also such further sums as C. should or might thereafter advance to P. in the course of his business, not exceeding in the whole 5000*l.* : was held not to be avoided by C. having allowed P. to overdraw to an amount together with the 4000*l.* exceeding 5000*l.* ; for the condition did not restrict C. from making P. advances beyond the 5000*l.*, but simply limited the liability of S. to the 5000*l.*, however large the advances might be (*k*). Where an annuity had been granted with liberty for the grantor or his surety to redeem it upon the payment of a certain sum, after giving the grantee notice of such intention, and the grantor and grantee unknown to the surety subsequently entered into

(*j*) *Calvert v. The London Dock Company*, 2 Keen, 638 ; *S. C. nom. Warre v. Calvert*, 7 Ad. & Ell. 143.

(*k*) *Parker v. Wise*, 6 M. & Sel. 239 ; and see *ex parte Rushforth*, 10 Ves. 409 ; *Paley v. Field*, 12 Ves. 435.

new arrangements, by one of which it was agreed that the grantee should not until the expiration of five years from the date of such new arrangement, or until the death of the grantor's father (which should first happen), demand or sue for the said annuity or any part thereof, and by another of the said arrangements made at the expiration of the five years (the grantor's father being then alive, and the annuity unredeemed, and the arrears unpaid), the grantor consented to receive the arrears of the annuity by instalments, the payment of them to be secured by a judgment acknowledged by the grantor: it was held, that these arrangements, and the change in the terms of redemption, had altered the situation of the surety, and that he was thereby *wholly* discharged, as well from all claims, in respect of the past as of the future arrears of the annuity (*l*). So where in an action in a replevin suit, an arrangement is made between the landlord and tenant, without the knowledge or consent of the sureties in replevin, to refer the cause to an arbitrator, and that the replevin bond shall stand as a security for performance of the award, the sureties will, it seems, be held discharged (*m*) (4). So if S. engages to

(*l*) *Eyre v. Bartrop*, 3 Madd. 221.

(*m*) *Archer v. Hale*, 4 Bing. 464; and see *ante*, pp. 177 & 178.

(4) In *Ward v. Henley* (1 You. & J. 285), a bill had been filed by the sureties in a replevin bond to be relieved from their liability, in consequence of transactions which had taken place between the landlord and tenant, without the sanction of the sureties. It appears from the report of the case, that on the trial of the action of replevin, a verdict was taken by agreement between the plaintiff in the action and the avowant, for the penalty of the bond, subject to a reference, not only as to the amount of the rent due at the time of the distress, but of the rent *then* due, and also of certain penal rents (the sureties having been no parties to such agreement).

In delivering the judgment of the court, Alexander, L. C. B. is reported to have said, "If a replevin suit (in which the only issue is, whether there was rent in arrear at the time of the distress) be referred at the trial, and by the terms of the rule of reference, the matter in difference in the cause be merely referred, the jurisdiction of the arbi-

guarantee the amount of goods supplied by C. to P., provided eighteen months' credit be given, C. is not at liberty to give twelve months' credit only, and after the expiration of six months more, to call upon S. on his guarantee (n).

Connected with this branch of the subject, may be mentioned those contracts which are founded upon some statutory power, and in which the legislature has imposed the necessity of a surety or sureties being joined. In order to make the surety or sureties liable, the requisition of the Statute must be strictly pursued.

Upon the above principle, it would seem, that where commissioners are empowered under an Act of Parliament, to make an advance of money upon a certain specified security, and the act gives to the surety who is directed to join in such security crown process in the event of his being called upon to pay, if the commissioners advance the money on a security not authorized by the act, and thereby deprive the surety of the benefit which he otherwise

(n) *Bacon v. Chesney*, 1 Stark. 192.

trator would be confined to the issue on the record, and in such a case, he could decide only on the amount of the arrears at the time of the distress, in the same manner as the jury must have done, if the cause had actually proceeded to a verdict. In the case put, the sureties in the replevin bond would have had no ground of complaint, inasmuch as their liability, namely, the amount of the rent in arrear at the time of the distress, would not be altered, the arbitrator being substituted in the place of the jury, and the award, as well as the verdict, must have been confined to the rent originally distrained for."

A perpetual injunction was decreed against the landlord's proceeding against the sureties in the bond, on the ground that the rent originally distrained for, (*and for which only the sureties were liable*), had been fully paid before the trial of the action of replevin, and therefore the above stated opinion of the learned Chief Baron, must be looked upon as extra judicial: and it would seem to be open to some doubt, whether an arrangement entered into between the landlord and tenant, by which the matter in dispute is to be referred to the decision of a single individual, which otherwise would have to be determined by a jury, is not a *departure from the contract* which the sureties entered into, and an arrangement by which they *may be prejudiced*.

would have had, if the act had been complied with, the commissioners will, as against the surety, lose the benefit of such security (o). So where two persons were appointed to fill the office of clerk to trustees under an act for making and maintaining a turnpike road, and the act directed that all contracts and agreements to be made, or entered into for the farming or letting the tolls of such turnpike-road, should be signed by the trustees or *by their clerk*, and the lessee or farmer, and his sureties, of such tolls respectively : and a contract for letting such tolls was entered into by one of such appointed persons, and the lessee or farmer, and his sureties : it was held, that the two appointed persons together constituted the trustees' clerk, and not one singly ; and that although it was competent for the trustees to have appointed one person only as their clerk, yet, as they had in fact appointed two persons, the signature of one only was not, under the authority of the Act of Parliament, sufficient to bind the principals in a contract, and consequently could not bind the sureties (p). So where by a local statute, prior to the general turnpike act, the trustees of a turnpike-road were empowered to let the tolls, by writing, under their hands and seals, *the rent to be made payable to their treasurer*, in default of which every such lease should be null and void to all intents and purposes whatsoever : in an action of covenant brought against the surety for arrears of rent for tolls received by the lessee, under a lease granted by the trustees subsequently to the general turnpike act, by which the rent was made payable to *the trustees, or their treasurer*, it was held, that the clause in the local act was still imperative, though by the general turnpike act, it is enacted, that after the tolls shall have been let as there

(o) See Lord Eldon's observation in *The Bank of Ireland v.*

Beresford, 6 Dow, 233.

(p) *Bell v. Nixon*, 9 Bing. 393.

directed, the purchaser shall enter into a *proper agreement* for the taking thereof, *and paying the rent under such conditions, and in such manner as the trustees shall think fit*, and that a lease making the rent payable to *the trustees or their treasurer*, was not conformable to the local act; for the direction, in the general turnpike act, that the purchaser should enter into *a proper agreement*, must be construed with reference to the clause on that subject in the local act, and that the lessee's surety might take advantage of the defect, though the lessee had taken the tolls for several years under the lease (*q*).

8. Of secret and fraudulent agreements entered into by the creditor.

(1st.) Where the surety is ignorant of the secret agreement.

(2ndly.) Where the surety is a party to such secret agreement.

(1st.) Where the surety is ignorant of the secret agreement.

It is the duty of the creditor, to put the surety in possession of all the facts likely to affect the degree of his responsibility, and any concealment of a material part of the transaction, or any secret understanding between the creditor and principal, whereby the liability of the surety may be increased, will be considered as a fraud upon the surety, and vitiate the contract (*r*); thus, where P., a dealer in iron, being indebted to C., a manufacturer of pig iron, for goods previously purchased of him, applied to C. for another supply, and proposed to pay him 10*s.* beyond the market price for every ton of iron supplied to him, which sum of 10*s.* was to be ap-

(*q*) *Pearse v. Morrice*, 2 Ad. & Ell. 84.

(*r*) *Pidcock v. Bishop*, 3 B. & Cress. 605; *S. C.* 6 Dowl. & Ry. 505; *Stone v. Compton*, 5 Bing.

N. C. 142; and see *Jackson v. Duchaire*, 3 T. R. 551; *Cecil v. Plaistow*, 1 Anstr. 202; and *Middleton v. Lord Onslow*, 1 P. Wms. 768.

plied by C. in liquidation of the old debt, and C. gave his consent to this arrangement, upon having the payment secured by the guarantee of a third party, and S. became surety for the goods to be supplied, without notice of the arrangement as to the application of the 10*s.*: such bargain was held a fraud on the surety, and rendered the guarantee void; for the effect of the bargain would be, to compel the vendor to appropriate to the payment of the old debt, a portion of those funds which the surety might reasonably suppose would go towards paying the debt, for the payment of which he had made himself collaterally responsible, and consequently the risk of the surety would thereby be increased (*s*). So where S., at the request and on behalf of P., who was about to enter a house which C. had before occupied, agreed to purchase, at a certain price for P.'s benefit, the goods left by C. in the house, and C. and P. enter into a private agreement, whereby P. was to give C. an additional sum for the goods: such private agreement was held void, although it was proved that the goods were worth more than the sum for which it had been agreed they should be purchased by S., and though the bill of sale was made to S. and not to P. (*t*). So where P., being indebted to C. in a sum of £500, and having occasion for the loan of a further sum of money, an agreement is entered into between C. and P., that C. shall advance P. the sum of £1,500, and that C. shall thereout deduct or repay himself the sum of £500; and S., as surety for P., in ignorance of the private agreement between C. and P., and acting under the belief that P. had the benefit of the advance of the whole sum of £1,500 (when in fact the sum of £1,000 only is

(*s*) *Fidcock v. Bishop*, 3 B. & Cress. 605; *S. C.* 6 Dowl. & Ry. 505. (*t*) See *Jackson v. Duchaire*, 3 T. R. 551.

advanced,) gives his promissory note to the creditor for the sum of £1,500: such security in the hands of the creditor is void at law, on the ground of fraud (*u*). So where the creditors of P. agree to accept a composition in discharge of their demands, upon having the composition money secured to them by a third party, and one of the creditors privately prevails upon P. to give him security for the residue of his debt (*v*): such agreement is void as a fraud upon such surety, since the debtor has not the benefit of the contract which the surety intended he should have.

And it makes no difference, that the security is given to the creditor by the principal, after the deed of composition is executed, if it was in respect of the demand which existed before, and was so given in pursuance of an agreement entered into previously to the execution of the deed (*w*). In *Knight v. Hunt* (*x*), one William Watson, being in bad circumstances, proposed to compound with his creditors for 10s. in the pound, and the plaintiff, to whom he owed £300, refused to accede to the proposal, whereupon John Watson, William Watson's brother, went to the plaintiff, and spontaneously agreed, at his own cost, to supply the plaintiff with coals to the amount of £150, if he would sign the agreement for William Watson's composition, to which arrangement the plaintiff assented, and then signed the agreement to take 10s. in the pound, to be paid with the other creditors. For the 10s. in the pound, the plaintiff afterwards agreed to take the joint and several promissory note of William Watson, and of the defendant and another person,

(*u*) *Stone v. Compton*, 5 Bing. N. C. 142.

(*v*) See *Middleton v. Lord Onslow*, 1 P. Wms. 768; *Cecil v. Plaistow*, 1 Anstr. 202; and the

observation of Buller, J., in *Nerot v. Wallace*, 3 T. R. 17.

(*w*) See *Cecil v. Plaistow*, *supra*.

(*x*) 5 Bing. 432.

as his sureties. The note was given, and John Watson furnished the plaintiff with coals to the amount agreed on : in an action, afterwards brought against the defendant upon the note, it was held, that the plaintiff could not recover, upon the ground that he had, by the amount in coals delivered by John Watson, received as much as the other creditors, and that any contract for more, was a fraud on them.

(2ndly.) Where the surety is a party to the secret agreement.

Upon the ground of public policy, a surety will not be held responsible, though he be *particeps criminis*, the relief being given on account, not of the individual, but of the public ; as where one of several creditors refusing to concur with the others in executing a composition deed, unless the debtor privately secure to him the whole, or some portion of his debt, over and above what the other creditors would receive under the composition deed (*y*) :— or, where being satisfied with the composition money, he requires, in like manner from the debtor, not a larger sum, but better or additional security (*z*), and in consequence thereof, S., on behalf of such debtor, with knowledge of these facts, but unknown to the other creditors, gives to the individual creditor the required security : such private agreement is a fraud upon the rest of the creditors, being an attempt to get a preference, where they had all bargained for, and supposed they were anticipating in, an equality of benefit and a mutuality of security, and the security given by the surety is

(*y*) *Jackman v. Mitchell*, 13 Ves. 581 ; *Coleman v. Waller*, 3 You. & J. 212 ; and see *Cockshott v. Bennett*, 2 T. R. 763 ; *Jackson v. Lomas*, 4 T. R. 166 ; *Morgan v. Bruen*, Lloyd & G. temp. Sug. 180 ; and the observation of Buller, J., in *Stock v. Mawson*, 1 Bos.

& P. 286 ; but see the observation of Lord Tenterden, C. J., in *Jones v. Yates*, 9 B. & Cress. 532.

(*z*) *Leicester v. Rose*, 4 East, 372 ; overruling *Feize v. Randall*, 6 T. R. 146 ; and see *ex parte Sadler & Jackson*, 15 Ves. 52.

void (5). So where D., an insolvent, having petitioned the Court for the Relief of Insolvent Debtors to be discharged out of custody, and having been brought up before that court to be examined, was opposed by C., a creditor, and remanded to a future day, and before that day arrived, A., who acted as the attorney of D., in consideration of C.'s withdrawing his opposition to D.'s discharge, undertook that C. should be the sole assignee of D.'s estate, and guaranteed that C. should, as assignee, receive £100 out of it, within three months from his appointment: it was held, that this agreement was contrary to the policy of the Insolvent Act, and therefore void (a). So where an insolvent debtor, having given to one of his creditors his promissory note as an inducement to withdraw his opposition to his discharge under the act, and having been, subsequent to his discharge, arrested by the creditor for non-payment of such note, settled the action by giving a warrant of attorney, (in which the debtor's brother joined,) to confess a judgment for the debt, costs and interest, to be paid by instalments: the court, on motion, set aside this warrant of attorney, even after payment of the first instalment (b).

Still less will the surety be held liable to his engagement, where the object for which he gave his security does not take effect, if the agreement entered into between him and the creditor was fraudulent in

(a) *Murray v. Reeves*, 8 B. & Cress. 421.

(b) *Rogers v. Kingston*, 2 Bing. 441.

(5) Where a creditor refused to sign a composition deed, until he had been passured by the party who had guaranteed the principal's responsibility, that he would pay him the remainder of his debt, which the surety having done, he drew a bill for the amount paid by him to the creditor, upon, and which was accepted by, the principal; it was held, that the surety could not recover from the principal the amount of the acceptance, it being nothing more than a circuitous mode of securing to the creditor, the full amount of his debt (*Bryant v. Christie*, 1 Stark. 329).

its creation ; as where a creditor (being one of several creditors) receives the promissory note of the surety, as an inducement to prevail upon the other creditors to discharge the debtor, by entering into a composition with him, and with the understanding that the note is to be kept a secret from the debtor's other creditors, and which object the debtor endeavours in vain to accomplish (c). And a court of equity will, upon the application of the surety, order all securities which he may have given to the creditor to be delivered up to be cancelled : but will not, in a case where the surety is *particeps criminis*, give the surety his costs of setting aside the illegal transactions (d).

II. Of the surety's discharge, by operation of law.

A surety may be discharged from his liability, by virtue of the statutes passed for the relief of bankrupts and insolvents, and also by the statutes passed for the limitations of actions.

The cases in which the surety will, or will not, be discharged upon his becoming bankrupt, or insolvent, have already been considered (e), and it only remains therefore to consider when the surety shall be discharged by virtue of the statutes of limitations.

By the 3rd section of the statute 21 Jas. 1, c. 16, it is enacted, that all actions upon the case (other than slander), shall be commenced and sued within six years next after the cause of such actions, and not after. And by the 40th section of the recent statute 2 & 3 Wm. 4, c. 27, it is enacted, that no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage,

(c) *Wells v. Girling*, 1 Brod. & B. 447.

(d) *Morgan v. Bruen*, Lloyd & G. temp. Sug. 180 ; *Debenham v.*

Ox, 1 Ves. 276 ; and see *Eastbrook v. Scott*, 3 Ves. 456.

(e) See *ante*, p. 101, *et seq.*

judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto, shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent: and in such case, no such action or suit or proceedings shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

If the promise of the surety be a promise of indemnity, the statutes begin to run as against the surety, when the party to whom the promise is given is damnified (*f*); for then legal proceedings may be instituted against the surety.

If a surety consent to become answerable for the debt which is then due from the principal to his creditor, in consideration of such creditor's extending to the principal the period of two years *and upwards* for the liquidation and settlement of his debt, the liability of the surety accrues, when the principal makes default after two years and upwards, and if (where the surety's promise is by a writing not under seal) an action be not brought against the surety within six years from the expiration of the two years, the surety may claim the benefit of the first-mentioned statute (*g*). So if the surety engage to become responsible for the debt of his principal, upon condition that no application shall be made to him, till after failure of the creditor's ut-

(*f*) See *Huntley v. Sanderson*,
1 Cr. & Mees. 467.

(*g*) *Holl v. Hadley*, 2 Ad. &
Ell. 758.

most efforts to obtain the same from the principal, the creditor shall not be permitted by virtue of such a condition, to have the power by his own laches, in not proceeding against the principal, to keep alive the surety's liability : and the Statute of Limitations will, notwithstanding such a condition, begin to run from the time when legal proceedings might have been instituted against the principal (*h*).

Where a debt is due from two or more persons, in respect of a contract which is several, a payment of a sum of money by one, on account of that debt, will not take the case out of the Statutes of Limitations as against any of the other persons (*i*) : but if the contract is a joint contract, a payment by one, is evidence of an acknowledgment by all of the existence of that debt, so as to take the case out of the Statute of Limitations (*j*) ; for each of the joint contractors makes the other his agent, for the purpose of making any payment in respect of the money due upon the contract : therefore if P. and S. give their joint promissory note, the former as principal, and the latter as surety, a payment by P. of a sum of money in respect of either principal or interest within six years from the time of action brought, will keep the note alive as against S. (*k*). But if the joint contract is severed by the death of P., a payment by his representative will not take the debt out of the Statute as against S., but the first-mentioned Statute will begin to run as against S., from the time when the joint liability ceased (*l*). So if the note is the joint and several promissory note of P. and S., and S. die in the life-time of P.,

(*h*) *Holl v. Hadley*, *supra* ; and see *ante*, pp. 199 & 200.

(*i*) See *Atkins v. Tredgold*, 2 B. & Cress. 23.

(*j*) *Pease v. Hirst*, 10 B. & Cress. 122 ; *Burleigh v. Stott*, 8 B. & Cress. 36 ; *Whitcomb v.*

Whiting, 2 Doug. 652 ; and see *Perham v. Reynal*, 2 Bing. 306.

(*k*) *Pease v. Hirst*, 10 B. & Cress. 122 ; *Wyatt v. Hodson*, 8 Bing. 309.

(*l*) *Slater v. Lawson*, 1 B. & Ad. 396.

a payment by P. will not take the debt out of the Statute as against S.'s representative (*m*): or if P. die in the life-time of S., will any payment by P.'s representative take the debt out of the operation of the Statute as against the surviving maker (*n*).

Formerly where the liability of the surety arose under a bond (*o*), or a judgment (*p*), satisfaction was presumed, where no payment had been made for a period of twenty years in respect of the bond from the time when it was forfeited, or in respect of the judgment from the time when it was entered up: but this lapse of time without any demand being made in respect of the one or the other, was not of itself a legal bar, but merely a *presumption* that nothing was due upon them, and this presumption might be rebutted (*q*): now, however, the creditor is, by the *statute 2 & 3 Wm. 4, c. 27*, barred of all relief, unless his claim be prosecuted within twenty years from the time when his right accrued.

(*m*) See *Atkins v. Tredgold*, 2 B. & Cress. 23.

(*n*) *Slater v. Lawson*, *supra*.

(*o*) *Willis's Case*, Holt, 123; *Colsell v. Budd*, 1 Camp. 27.

(*p*) *Willlaume v. Gorges*, 1

Camp. 217.

(*q*) See the observations of Lord Mansfield, C. J., and Buller, J., in *Oswald v. Legh*, 1 T. R. 270; and see *Willlaume v. Gorges*, 1 Camp. 217.

PART IV.

OF JUDICIAL PROCEEDINGS.

CHAPTER I.

OF ACTIONS BY THE CREDITOR.

THE nature of the action for enforcing at law, the contract of a surety who is liable for the debt, default, or miscarriage of a third person, depends upon the nature of the instrument under which the surety's liability attaches. If the surety's liability arise upon a guarantee, the contract must be enforced by a *special action of assumpsit*, to recover damages for the breach of the promise contained in the guarantee (*a*), and not upon a *general indebitatus assumpsit* (*b*); for the promise being merely a collateral promise, there is no *debt*, as between the creditor and the surety (*c*): and it is an objection to the plaintiff's recovering, even after verdict, if the undertaking is not declared on specially (*d*).

The plaintiff's declaration, if framed upon a deed, must be pleaded with a profert, to enable the defendant to crave oyer, and prepare his plea (*e*):

(*a*) *Butcher v. Andrews*, 1 Salk. 23; *Mines v. Sculthorpe*, 2 Camp. 215; *Marriott v. Lister*, 2 Wils. 141; *Rozet v. Rozet*, 2 Vent. 36; but see *Kent v. Derby*, 1 Vent. 311.

(*b*) *Butcher v. Andrews*, *supra*; Anon. 1 Vent. 293.

(*c*) *Rozet v. Rozet*, *supra*; *Marriott v. Lister*, *supra*.

(*d*) *Rozet v. Rozet*, 2 Vent. 36; *Butcher v. Andrews*, 1 Salk. 23; and see *Cooke v. Samburne*, 1 Sid. 182.

(*e*) *Lilley v. Hewitt*, 11 Price, 494.

but if the plaintiff declare on a collateral promise in writing, signed, but not under seal, he is not obliged to make profert of it, nor need he state in the declaration that it is in writing (*f*), or that it was signed by the defendant (*g*), or set out the terms of it (*h*): it is sufficient if the plaintiff set out in the declaration, enough of the terms of the agreement, to show he has good cause of action (*i*). And even where the defendant pleads, that the supposed promise declared on was a guarantee for the debt of another, and was contained in a memorandum in writing in the words and figures set forth in the plea, from which it would appear that there was no consideration to support the promise,—or, that the promise was not signed by the defendant according to the Statute, the plaintiff may nevertheless reply, that a memorandum of agreement, in writing, stating the consideration, was signed by the defendant: without setting out such memorandum in the replication (*k*). If, however, the plaintiff, knowing that the contract as set forth in the plea is not correctly stated, demur to the plea, he will be held to have admitted the contract to be as stated in the plea, and the court will not assume that there were other terms in the memorandum, which might have been proved at *nisi prius* (*l*).

A plea by a surety to an action brought against him by the creditor on his guarantee, that the creditor had, “without the knowledge or consent of the surety, allowed and granted to the principal,

(*f*) *Lysaght v. Walker*, 5 Bli. N. S. 1; *Anon.* 2 Salk. 519; *Lilley v. Hewitt*, *supra*; *Case v. Barber*, T. Raym. 450; and see Stephen on Pleading, p. 418, 2nd ed.

(*g*) *Lilley v. Hewitt*, *supra*.

(*h*) *Lilley v. Hewitt*, *supra*; *Cryps v. Baynton*, 3 Bulstr. 31.

(*i*) *Sharp v. Rolt*, Noy, 83;

Lilley v. Hewitt, 11 Price, 494.

(*k*) *Wakeman v. Sutton*, 2 Ad. & Ell. 78; *Lilley v. Hewitt*, *supra*; *Lysaght v. Walker*, *supra*; but see *Lowe v. Eldred*, 1 Cr. & Mees. 239.

(*l*) *Clancy v. Piggott*, 2 Ad. & Ell. 473; *Maggs v. Ames*, 4 Bing. 470.

longer and further time for payment" of the monies due from the principal to the creditor, will be held bad on a general demurrer, it not disclosing any contract whereby the creditor was prevented from suing the principal (*m*). And where a surety for a collector of taxes was proceeded against on a bond, given by him to the commissioners, acting in the execution of the Acts of Parliament relating to assessed taxes, for his principal's duly accounting; and the acts contained a clause, that no bond should be put in suit against the surety for any deficiency, other than what should remain unsatisfied after the sale of the lands, tenements, goods and chattels of the collector, a plea that the commissioners had not seized the lands, &c. of the collector, must show that there were lands, &c. of the collector which might have been seized, and sold to supply the deficiency (*n*).

A guarantee not addressed to any one, must be declared on as given to the party to whom it was delivered (*o*): and if a guarantee be addressed to one of several partners of a firm, it may be declared on as given to all; if there is evidence to show that it was given for the benefit of all (*p*), or that the partner to whom it was addressed, did not carry on any separate business in respect of the matters and things for which the guarantee was given (*q*).

Where the defendant promised the plaintiff, who was an innkeeper, upon the defendant's friend putting up at the inn, to pay him for such necessaries as his friend should want, and the plaintiff should provide him with, and the plaintiff in his declaration averred, that he had provided for him necessaries amounting to such a sum, the declaration

(*m*) *Clarke v. Wilson*, 3 Mees. & P. 162.
& W. 208.

(*p*) *Garrett v. Handley*, 4 B. & Cress. 664.

(*n*) *Wilks v. Heeley*, 1 Cr. & Mees. 249.

(*q*) *Walton v. Dodson*, *supra*.

(*o*) *Walton v. Dodson*, 3 Car.

was held good, though it did not show what necessities in particular the plaintiff had provided for him (*r*).

In an action upon a bond given by the defendant a surety, conditioned for the principal's duly rendering an account of all monies received by him as collector of the poor's rates, it was held, that the office being a voluntary one, and not cast by law on the defaulting party, it was necessary to aver, not only an appointment, but an acceptance by the person appointed (*s*). And in an assumpsit against the defendant upon his collateral promise, that he would pay the debt of a third party, provided the plaintiff would give such third party a certain time to pay the debt, it was held, that the plaintiff ought to have alleged the consideration was performed on his part, by giving the party the time required (*t*): but the creditor need not show how the debtor became indebted to him; for the defendant, by procuring at his request the forbearance of the debt, is a sufficient acknowledgment that it was due (*u*).

The plaintiff must prove at the trial the averments contained in the declaration (*v*), and in an action against the surety upon his collateral promise, he must prove (although he need not in his declaration allege it to have been so) (*w*), that the contract was in writing, and signed by the defendant, or by his agent lawfully authorized (*x*): unless indeed the defendant has, by his pleading, dispensed with such proof (*y*); as where the surety, in an action brought

(*r*) *Cryps v. Baynton*, 3 Bulstr. 31.

(*s*) *Serra v. Wright*, 6 Taunt. 45.

(*t*) *Anon.* Godb. 13, pl. 20; *Rogers v. Snow*, Dalis. 94, pl. 17.

(*u*) *Lingen v. Broughton*, 3 Bulstr. 206.

(*v*) 1 Stark. on Evidence, p. 394, ed. 1833; *Lysaght v. Walker*, 5 Bli. N. S. 1; *Stapp v. Lill*, 1

Camp. 242; *S. C. nom. Stadt v. Lill*, 9 East, 348.

(*w*) *Supra*.

(*x*) *Anon.* 2 Salk. 519; *Lilley v. Hewitt*, 11 Price, 494.

(*y*) *Middleton v. Brewer*, Peake, 15; *Kay v. Groves*, 4 Car. & P. 72; *Gutteridge v. Smith*, 2 H. Blk. 374; and see *Israel v. Benjamin*, 3 Camp. 40.

against him upon his contract, pleads a tender (z), or pays money into court (a); for thereby he admits the contract, and the creditor's right to sue on it, and its proof becomes unnecessary.

Where the plaintiff was applied to, to lend money to P., and the plaintiff requested a firm of which he was a member to do so, and they advanced the money, debiting P. in their books, it was held, that the plaintiff could not maintain an action against S., who had guaranteed the repayment of the money to be advanced to P. by the plaintiff, since the declaration stated that the plaintiff advanced the money, whereas the proof was that the firm did so (b): had the plaintiff borrowed the money of his partners, and then advanced it to P., the action would have been rightly brought (c).

It would seem, that the principal debtor is a competent witness for the creditor, in an action brought by the latter against the surety; for in the event of the suit he stands indifferent; being liable on the one hand to the creditor if the action fails, and to the surety if the action succeeds (d) (1). So entries made by the principal, in a book proved to have been in his possession at his death, acknow-

(z) *Middleton v. Brewer, supra.*

(a) *Kay v. Groves, supra*; *Gutteridge v. Smith, supra.*

(b) *Garrett v. Handley*, 3 B. & Cress. 462; *S. C.* 1 Car. & P. 483.

(c) *Per Abbot, C. J., in id.*

(d) *Collins v. Gwynne*, 9 Bing. 544; and see *Middleton v. Melton*, 10 B. & Cress. 317; *Goss v. Watlington*, 3 Brod. & B. 132; *Whitnash v. George*, 8 B. & Cress. 556.

(1) Where P., together with A. and B., as his sureties, executed a bond to C., for securing to him a sum of money and interest, and A. by the order and with the money of P., paid off the principal and interest due on the bond, which was thereupon delivered up to A., who, after keeping it in his custody some time, prevailed upon C. to assign it to J. S. as a collateral security for A.'s own debt, C., however, informing J. S. at the time, that nothing was due upon the bond: in an action brought against B. upon the bond, it was held, that A. was a competent witness, though *particeps criminis*, to prove payment to the obligee, and the fraudulent assignment of the bond to J. S.; inasmuch as A.'s evidence operated to his own prejudice, he remaining liable to the assignee of the bond (*May v. Harman*, 4 Bro. P. C. 156).

ledging the receipt of monies, for the due accounting for which the surety was responsible, are, after the principal's death, admissible in evidence in an action against the surety (*e*); upon the general principle, that they were entries made by a party cognizant of the facts, and were against the interest of the party who made them. And it is immaterial whether the book containing the entries, is one which it was the principal's duty to keep, and for the performance of which duty, the surety had become bound (*f*):—or whether it is a mere private book of the deceased principal, and one which he was under no obligation to keep (*g*):—or even where the parties, who had paid the principal the monies in question, were alive and might have been called as witnesses (*h*); for if the admissions are evidence of the facts admitted, it can make no difference that the same facts may be proved by evidence of another kind. But the *admissions* of the principal are not, *while he is alive*, sufficient to charge the surety, the evidence not being the best the case is capable of affording (*i*) (2).

(*e*) *Goss v. Watlington*, 3 Brod. & B. 132; *Whitnash v. George*, 8 B. & Cress. 556; *Middleton v. Melton*, 10 B. & Cress. 317.

(*f*) *Goss v. Watlington*, *supra*; *Whitnash v. George*, *supra*.

(*g*) *Middleton v. Melton*, *supra*.

(*h*) *Middleton v. Melton*, *supra*.

(*i*) *Evans v. Beattie*, 5 Esp. 26; *Bacon v. Chesney*, 1 Stark. 192; *Cutler v. Newlin*, Man. Dig. tit. Evidence, pl. 253; and see *Hart v. Horn*, 2 Camp. 92.

(2) In *Ward v. Suffield* (5 Bing. N. C. 381), the declaration stated, that the plaintiff was about to employ an agent for the sale of turpentine and certain other property, and that in consideration the plaintiff would employ one *Henry New* as his agent to collect his debts, the defendant undertook and promised the plaintiff to be responsible to him, for all sums of money which *New* might receive as the plaintiff's agent, not exceeding the sum of 250*l.*; and then alleged that *New* did not pay over what he had received.

At the trial, after the defendant's signature to the guarantee had been proved, and that a *Mr. Bradley* was also a surety for *New*, the plaintiff gave in evidence the following letter from his attorney to the defendant:—"On the other side you have accounts between *Ward* and *New*, as agreed to by the latter, by which a balance of 183*l.* 9*s.* 2*d.* is due to *Mr. Ward*, with some slight deductions for postage, &c., Nov.

If the defendant's bail be a material witness for him in the action, the court will, upon the application of the defendant previous to the trial, order the name of such bail to be struck off the bail piece, upon the defendant's inserting the name of other bail in his room (*j*):—or will, at the trial, make the bail a competent witness upon the defendant's depositing in the hands of the officer of the court, a sum equal to the sum sworn to and the costs of the action (*k*) (3).

(*j*) *Collet v. Jennis*, Rep. temp. Hardw. 133.

(*k*) *Baillie v. Hole*, 1 Mood. & M. 289; S. C. 3 Car. & P. 560.

8th, 1837 ;" and the defendant's answer to such letter, which was as follows:—"In reply to yours of this morning, I have to inform you that I have sent by this evening's post to *Bradley* for his share, which, when I have received, I will remit with mine to *Mr. Ward*."

The defendant declining to produce the account sent to him, a witness named *Lang* then proved that he and *New* together had gone over an account, and that *New* admitted it to be correct. Another witness identified the account which *New* had gone over as a duplicate of that sent to the defendant.

On the part of the defendant it was objected, that *New* being alive, the declaration made by him to *Lang* was not admissible in evidence, *New* himself ought to have been called.

The learned judge, before whom the cause was tried at *Nisi Prius*, admitted the testimony of *Lang*, and left it to the jury to say, whether the paper produced by him was the account agreed to by *New*. A verdict was found for the plaintiff, which the court of Common Pleas afterwards refused to disturb. *Tindal*, C. J., in his judgment said,—“It is true, that when the principal debtor is alive, his declarations are not evidence against his surety, but the account which *New* had examined and assented to as a correct statement of the account between him and the plaintiff, was, under the circumstances of this case, evidence against the defendant, and the object of calling *Lang* was only to identify that account.” And *Erskine*, J., said,—“I am of opinion the evidence was properly received, the defendant having declined to produce the account sent to him, the correctness of which, as agreed to by *New*, he had admitted in his letter of the 8th of November, secondary evidence of the account was produced by *Lang*. If the testimony of *Lang* had been left to the jury, as proving the amount agreed to by *New*, I should have thought there might have been ground for a new trial: but the question was, whether the account produced by him was that which the defendant admitted *New* had agreed to?”

(3) So if a surety in a replevin bond, is a material witness for the plaintiff in the cause, the court will allow another surety to be substituted in his stead, on his being approved of by the prothonotary,

Where the instrument of suretyship is a bond, the surety cannot, in an action brought against him on it by the creditor, upon a plea of *non est factum*, go into evidence to prove the illegality of the consideration, where such illegality does not appear upon the face of the instrument (*l*):—or that the defendant was misled as to the legal effect of the bond (*m*):—or that the bond was obtained by fraud (*n*); but these facts must be specially pleaded (*o*). Neither can the surety, where the instrument of suretyship is a bond, or other instrument under seal, go into evidence to show that he is discharged from his liability, by reason that the creditor had, by *parol*, given time for payment to the principal, without the knowledge of the surety (*p*); since it is a rule in law, that an instrument under seal cannot be discharged by *parol* (*q*): but the surety must, in order to avail himself of such evidence, have recourse to a court of equity for relief (*4*).

(*l*) *Harmer v. Rowe*, 6 M. & Sel. 146; *Harmer v. Wright*, 2 Stark. 35; *Colton v. Goodridge*, 2 Blk. 1108.

(*m*) *Edwards v. Brown*, 1 Cr. & J. 307.

(*n*) *Edwards v. Brown*, *supra*.

(*o*) And see *White v. Ansdell*, 1 Mees. & W. 348.

(*p*) *Davey v. Prendergrass*, 5

B. & Ald. 187.

(*q*) See *ante*, p. 187.

and giving the defendant's attorney notice to appear before him to oppose such approval; as in case the surety so substituted should be insufficient, the defendant would be deprived of his remedy against the sheriff on the bond (*Bailey v. Bailey*, 1 Bing. 92; *S. C.* 7 J. B. Moo. 439; and see *Baillie v. Hole*, *supra*).

(*4*) In *Hough and another v. Warr* (1 Car. & P. 151), an action was brought on a bond against the defendant, as surety for the collector to the Bloomsbury Dispensary, of which the plaintiffs were the treasurers. The defendant pleaded the general issue.

A witness proved the execution of the bond, and the collector himself proved his being a defaulter to the amount of between 200*l.* and 300*l.*

The defendant's counsel inquired whether his lordship thought a letter addressed by the defendant to the committee of the Dispensary, previous to the deficit, stating that he should not consider himself bound after the date of that letter, and that he had informed the collector of such his determination, could avail him in that action, or whether he must go into equity for relief? Per Abbott, C. J., "I think

CHAPTER II.

OF ACTIONS BY THE SURETY.

I. Against the principal.

II. Against a co-surety.

I. Against the principal.

IN an action by a surety against the principal, for money paid on account of the latter, the plaintiff must prove the original obligation, by proof of the bond, agreement, or other instrument, by which he became surety. And unless the fact appear from the instrument itself as executed by the defendant, proof must be given that the plaintiff became a party at the instance of the defendant in the character of surety, or that he assented to it (*r*). The plaintiff must also prove actual payment of the money by him, and that he gave notice to the defendant to repay it (*s*).

II. Against a co-surety.

A surety, in an action against a co-surety, must prove their obligation as co-sureties,—his application to the defendant to pay his share,—and the payment by himself (*t*).

If a verdict has been obtained against one of several sureties, against whom the debt and costs have been levied, the record of the judgment will (it seems) be evidence against a co-surety, in an action against him for contribution (*u*). Where

(*r*) See 2 Stark. on Evidence, ed. 1833.
pp. 59 & 773, ed. 1833.

(*u*) See *Powell v. Layton*, 2
N. R. 365.

(*s*) See *ibid.*
(*t*) 2 Stark. on Evidence, p. 774,

he must go into equity." His lordship then inquired if the letter had been pleaded, and was answered in the negative. The defendant's counsel then asked, if his lordship thought that after such a notice, they could be considered to have trusted the collector under the bond? Per Abbott, C. J., "I think they may till it is revoked: at all events you should have pleaded it." And the plaintiffs had a verdict.

there are several sureties, and the debt is paid by all or some of them, each surety must sue the principal separately for the share paid by him, and they cannot maintain a joint action against the principal for the several proportions of the money paid by them (*v*); unless the debt, so paid by the sureties joining as plaintiffs, was paid by them out of a joint fund, in which case a joint action for the repayment of the money so paid by them may be maintained (*w*). The evidence of the principal, who had become bankrupt and obtained his certificate, is not admissible for the defendant in an action brought against the latter for contribution, to show that payments were made by the principal to the creditor, and that the creditor had *subsequently* acknowledged, that the payments so made were received by the creditor in satisfaction of the debt for which the sureties were liable, and not on account of a debt due from the principal for which he was solely liable, but the plaintiff has a right to the oath of the creditor, and to be at liberty to cross-examine him (*x*): had the declaration of the creditor been made *at the time of payment*, it seems it would have been admissible as part of the *res gestæ* (*y*).

(*v*) *Kelby v. Steel*, 5 Esp. 194;
Brand v. Boulcott, 3 Bos. & P.
 235.

East, 225.

(*x*) *Dunn v. Slee*, Holt, N. P. C.
 399.

(*w*) See *Osborne v. Harper*, 5

(*y*) *Dunn v. Slee*, *supra*.

CHAPTER III.

OF THE NECESSARY PARTIES TO A SUIT IN EQUITY.

THE rule in equity being, (except in particular cases,) that all persons interested in the subject-matter of a suit, however numerous, should be parties, that there may be a complete decree between all parties having material interests (z), a creditor suing upon a joint, or joint and several, undertaking, must bring all the debtors before the court, principals as well as sureties (a); for no account taken would be binding upon an absent party, and consequently no complete decree could be made (5): besides the debtors are entitled to the

(z) *Cockburn v. Thompson*, 16 Ves. 321; *O'Carroll's Case*, Ambl. 61; *Capel v. Butler*, 2 Sim. & S. 457; *Madox v. Jackson*, 3 Atk. 406; and see Lord Eldon's observation in *Cockburn v. Thompson*, *supra*.

(a) *Bland v. Winter*, 1 Sim. & S. 246; *Ashurst v. Eyre*, 2 Atk.

51; *S. C.* 3 Atk. 341; *Madox v. Jackson*, 3 Atk. 406; *Angerstein v. Clark*, 2 Dick. 738; *S. C.* 3 Swanst. 147 n; *Anon.* 2 Freem. 127; *Cockburn v. Thompson*, 16 Ves. 321; overruling *semb. Collins v. Griffith*, 2 P. Wms. 313; *S. C.* 2 Eq. Ca. Abr. 188.

(5) The late case of *Newton v. The Earl of Egmont* (4 Sim. 574), seems at variance with the proposition here laid down. The facts of this case appear to be these:—Certain estates in Somersetshire were settled to the use of John James Earl of Egmont, the defendant's late father, for life, with remainder, to such uses as the said John James Earl of Egmont, and John Earl of Egmont, his son, then Viscount Perceval, should during their joint lives appoint, with remainder, to such uses as John Earl of Egmont, the son, in case he should survive his father, should appoint, with remainder, to John Earl of Egmont, the son, for life, with remainder, to trustees to preserve contingent remainders, with remainder, to John Earl of Egmont, the son's first and other sons successively in tail male, with remainder, to John James Earl of Egmont in fee.

By an indenture dated in 1817, executed during the lifetime of John James Earl of Egmont, the father, John Earl of Egmont, the son, together with Viscount Perceval, then the Honorable Henry Perceval, the only son of John Earl of Egmont, and Thomas Wynn Bellasye, Esquire, as sureties, covenanted with Newton, (the

assistance of each other in taking the accounts (b), and where one has paid more than his share of the

(b) See *Thorpe v. Jackson*, 2 You. & Coll. 553; and the observation of Lord Hardwicke in *Madow v. Jackson*, *supra*.

plaintiff in the suit,) to pay to the plaintiff Newton, a certain annuity during the life of a person named in the indenture, and John Earl of Egmont, the son, and Viscount Perceval, by way of collateral security, demised the Somersetshire estates to Griffin, (a trustee for the plaintiff Newton,) from the day of the decease of John James Earl of Egmont, the father, for a term of years determinable on the death of the *cestui que vie*: and John Earl of Egmont, and Viscount Perceval, severally covenanted with the plaintiff Newton, that if they, or either of them, should survive John James Earl of Egmont, the father, then immediately after his death, they or the survivor would appoint or demise the estates to Griffin the trustee, or to such other trustee as the plaintiff Newton should appoint, for the term of 1000 years from the day of the decease of John James Earl of Egmont, the father, upon certain trusts therein mentioned, (being for the benefit of the plaintiff Newton, and to secure his annuity,) determinable on the life of the *cestui que vie* named in the indenture, and subject thereto, in trust for the person or persons entitled to the freehold and inheritance of the estates expectant upon the term of 1000 years.

In the year 1822, (John James Earl of Egmont, the father, being then dead,) John Earl of Egmont granted other annuities to the plaintiff Newton, for securing which annuities, John Earl of Egmont appointed, and Viscount Perceval, by way of further assurance, demised the same estates, with other property, to Griffin, but no notice was taken of the term of years which was to have been raised for securing the annuity under the indenture of 1817.

In the year 1824, John Earl of Egmont appointed and conveyed the estates comprised in the indenture of 1817 together with other estates, to certain trustees named in the indenture, for the benefit of such of the earl's creditors as should execute the conveyance and appointment. Several of the earl's creditors executed this deed, and one of them, on behalf of himself and the others, filed a bill to have the trusts of the deed carried into execution.

In 1830, a decree was pronounced in that suit; and in 1831, the plaintiff Newton filed his bill against John Earl of Egmont, Viscount Perceval, and the trustees named in the deed of 1824, together with the plaintiff in the creditors' suit, for carrying the last-mentioned deed into execution, and which bill, after stating to the effect above-mentioned, and also stating that the *cestui qui vie* named in the indenture of 1817 had died in the year 1825, and that there was then due to the plaintiff Newton, in respect of the annuity granted to him for the life of such *cestui que vie*, a considerable sum of money, and also a further sum in respect of the annuities subsequently granted to him, and that the trustees under the deed, and the several incumbrancers had notice of the plaintiff Newton's securities, before their securities were executed—prayed for an account of what was due to him under his securities,—that the priorities of himself and the other incumbrancers

debt, he is entitled to a contribution from him who has paid nothing, or less than his share: and by making all the debtors parties, the circuity of another suit for contribution is thereby avoided (c).

C. Greendale v. Benson, 3 Ask. 253, in notice.

might be declared,—that he might redeem the securities which should appear to be prior to his own, and that he might have the benefit of the decree as to that part of his demand for which he should not be entitled to priority over the trust deed.

To this bill, the defendant John Earl of Egmont, took two objections for want of parties; one of which was, that Mr. Bellasyse, who was one of the sureties for the payment of the annuity granted by the deed of 1522, was not a party to the suit.

In support of this objection it was urged, that there were large arrears of the annuity granted by the deed of 1522, which the sureties were liable to pay, and that the court could not grant the relief prayed by the bill, unless they were both before the court:—that both sureties ought to be present, in order to see that the priorities were properly settled.

For the bill it was stated, that Viscount Perceval was not made a party, as a surety, under the deed of 1817, but as a joint owner of the estate who had concurred in creating the incumbrance:—that Mr. Bellasyse had no interest in the estate, having merely joined in a personal covenant to pay the annuity, and that an incumbrancer may pursue his security on the land of the principal debtor, although another person may have joined as a surety in a personal security; and his honor the Vice-Chancellor held, that Mr. Bellasyse was not a necessary party, because it was not stated that he had any security on the estates, but only that he had entered into a personal covenant to pay the annuity granted by the deed of 1817.

It must be admitted, that Mr. Bellasyse, not being a party to the suit instituted by Mr. Newton, could not be affected by any thing that might be done in that suit; and that if Mr. Bellasyse remained liable to Mr. Newton upon his personal covenant, Mr. Bellasyse might, by redeeming or otherwise satisfying the annuity, have instituted a suit to settle the priorities between himself and the other incumbrancers; and this notwithstanding the priorities had been already established in the suit instituted by Mr. Newton, and thus there would have been two suits for the same object, which is against the general rule of the Court. It is clear also, that if Mr. Bellasyse remained liable to Mr. Newton, the former had an interest in seeing these priorities settled; for Mr. Newton might rely on Mr. Bellasyse's personal covenant to make good the arrears of the annuity, and take little interest in the question of priorities, and the proceeds of the estates comprised in the deed of 1824, might, upon the sale thereof, be in consequence applied in the discharge of subsequent incumbrancers, to the prejudice of Mr. Bellasyse, and in a manner different from what would have been the case if Mr. Bellasyse had been a party to the suit. Probably the Vice-Chancellor, in giving his judgment, proceeded upon the ground, that the creditor had *elected to sue the estate, and release the surety.*

So if any one of the debtors should have become bankrupt, his assignees are necessary parties (*d*), or if any one should have died, his representatives, both real and personal, must be brought before the court, whether the debt be a specialty, or a simple contract debt; for the late statute 3 & 4 *Wm.* 4, *c.* 104 (6) makes freehold and copyhold estates assets for the payment of simple contract debts, and the creditor may have to come in the last place upon the real assets for satisfaction.

The same necessity, of having all parties before the court who are interested in the subject-matter of dispute, exists, whether the suit is instituted for relief by a surety against the creditor, on the ground of fraud, and having been over paid (*e*),—or for relief by bail against the sheriff, for an undue assignment by him of the bail bond (*f*),—or by a surety to be relieved from his responsibility, to the extent of the value of securities assigned to the creditor, and lost by him through his neglect (*g*),—or for contribution by one surety who has paid, against another who has not (*h*).

Where the surety for an officer to the Commis-

(*d*) *Capel v. Butler*, 2 Sim. & Vern. 87; *S. C.* 1 Eq. Ca. Ab. 72. S. 457. (*g*) *Capel v. Butler*, 2 Sim. & S. 457.

(*e*) *Roveray v. Grayson*, 3 S. 457. (*h*) *Lawson v. Wright*, 1 Cox, Swanst. 145 n; *Makepeace v. Needler*, Bunb. 291. 275.

(*f*) *Izrael v. Narbourn*, 1

(6) Previous to the passing of this statute, it depended upon the nature of the obligation entered into with the creditor, whether upon the decease of the principal or the sureties, (they not being traders,) their real assets became chargeable with the debt due to the creditor: but in a suit by a surety for contribution, the personal representative of a deceased surety, was (in general) sufficient, without making the real representative a party, notwithstanding the obligation by which the sureties bound themselves was a specialty; since the surety paying the specialty debt of the principal debtor, was merely a simple contract creditor of the co-surety for the share which he was entitled to receive from the estate of the deceased surety (*Copis v. Middleton*, T. & Russ. 224): now, however, the statute has made the real estate liable, as well as the personal estate.

sioners of Excise, had been sued upon the bond given by him for his principal's duly accounting for the monies received by him by virtue of his office, filed his bill against the Attorney-General, and the accountants to the commissioners, alleging that the principal had duly accounted, and had paid more than he had received: it was held, upon a demurrer put in by the accountants for want of parties, that the accountants were only ministerial officers to the commissioners, and in nature of servants, and that the commissioners in being ought to be parties, though the commission might be varied from the time the plaintiff first became bound (i).

An exception to the rule above laid down takes place, where it is *proved*, or *admitted*, that the sureties are insolvent (j), or have not paid any thing (k); for there is then no pretence for the principal to say, that the creditor ought to bring the sureties before the court, the demand of the creditor being restrained as a demand against the principal, who has nothing to demand over: but it may be questionable whether in such a case, the creditor would not be considered to have given up his claim as against the surety. So if it be *proved*, or *admitted*, that the principal debtor is insolvent (l), or that, having died, he left no property at his death (m); neither the insolvent in the one case, nor his representative in the other, is a necessary party to the suit: the creditor may, however, if he think proper, make the insolvent a party, and he will not be entitled to his costs, even though the bill contain

(i) *Makepeace v. Needler*, Bunb. 291.

(j) *Per* Lord Eldon in *Cockburn v. Thompson*, 16 Ves. 321; *Angerstein v. Clark*, 2 Dick. 738; S. C. 3 Swanst. 147 n; *Madox v. Jackson*, 3 Atk. 406; *Lawson v. Wright*, 1 Cox, 275.

(k) See *Cockburn v. Thompson*, *supra*; *Madox v. Jackson*, *supra*.

(l) *Deering v. The Earl of Winchelsea*, 2 Bos. & P. 270; S. C. 1 Cox, 318.

(m) See the observation of Lord Hardwicke, C., in *Madox v. Jackson*, 3 Atk. 406.

a statement that the principal debtor is insolvent (*n*).

In a suit by a surety for contribution it is necessary upon the decease either of the principal debtor, or any of the co-sureties, to make the real and personal representatives of such principal debtor or co-sureties parties to the suit (*o*); unless the insolvency of such deceased principal debtor, or co-surety is both charged and proved (*p*).

If the principal have become insolvent, and is a party to the suit, it is not necessary to prove his insolvency (*q*): but if the principal be not before the court, his insolvency must be charged and proved (*r*).

If any one of the co-sureties have become insolvent, and the object of the bill is to seek contribution from the solvent co-sureties, for the share of the insolvent one, the insolvency of that co-surety should be charged and proved (*s*).

(*n*) *Haywood v. Ovey*, 6 Madd. 113; *O'Carroll's Case*, Ambl. 61.

(*o*) See stat. 3 & 4 Wm. 4, c. 104; *Onge v. Truelock*, 2 Moll. 31.

(*p*) See *Deering v. The Earl of Winchelsea*, 2 Bos. & P. 270; *S. C.* 1 Cox, 318; *Madox v. Jackson*, 3 Atk. 406; but see

Hole v. Harrison, 2 Rep. temp. Finch, 15.

(*q*) *Lawson v. Wright*, 1 Cox, 275.

(*r*) See *Madox v. Jackson*, 3 Atk. 406; *Angerstein v. Clark*, 2 Dick, 738; *S. C.* 3 Swanst. 147 n; *Lawson v. Wright*, *supra*.

(*s*) See *supra*.

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